RECORD, CASE No. 14,[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

TERM No., 146.

THE AMERICAN TUBE AND IRON COMPANY, PLAINTIFF IN ERROR,

vs.

OWEN EVANS, GUARDIAN OF WILLIAM LEWIS, A MINOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED AUGUST 6, 1890.

RECORD, CASE No. 14,096.

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1 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

Be it remembered that heretofore, to wit, on the 8th day of October, A. D. 1889, there was filed in this court a transcript of proceedings in the court of common pleas of Mahoning county, Ohio; which transcript is in the words and figures following, to wit:

Docket Entries.

Appearance Docket No. 14, Court of Common Pleas, Mahoning County, Ohio, page 15190.

Owen Evans, Guardian of William Lewis, a Minor,
vs.
The American Tube and Iron Company.

A. J. Woolf and King & McVey; Sanderson & Ladd.

Civil action. Money only.

Term.	Date.	
1888.		
May.	June 12.	Petition and precipe filed. Summons issued.
1888.	June 25.	Summons returned and filed, endorsed: Received this writ June 12th, A. D. 1888, and, pursuant to its command, on the 23rd day of June, A. D. 1888, I served the within-named def't, The American Tube and Iron Company, by delivering to J. H. Matheson, ass't sup't of said company, a true and certified copy thereof, with endorsements thereon, after having failed to find the president, vice-president, sec'y, treasurer, chairman of board of directors, or any other managing officer of the within-named company. Eli B. Walker, sheriff, by W. P. Prindle, dep'ty. Fees, $1.80.
	Sept. 7.	Answer filed.
Sept.	Oct. 29.	Deposition on behalf of def't filed and con-.
1889.		
Jan'y.		Continued.

2

May.	May 6.	Leave to parties to take depos. J. 37, p. 4.
"	May 7.	Reply filed.
	" 10.	Deposition on behalf of pl'ff filed.
"	May 16.	Petition for removal to U. S. circuit court filed.
"	" "	Bond for removal to U. S. circuit court filed.
"	" 24.	Leave is granted plaintiff to file amended petition, by consent of parties, which is done. J. 37, p. 53.
"	" 27.	Deposition on behalf of pl'ff filed.
"	" 24.	Amended petition filed.

Term.	Date.	
May.	June 6.	Leave to def'ts to answer amended petition 10 days after term, & continued. J. 37, p. 111.
"	Aug. 19.	Answer to amended petition filed.
	Sept. 10.	Reply to answer to amended petition filed.
Sept.	Sept. 16.	Petition for removal to U. S. circuit court filed.
"	" 20.	Bond for removal to U. S. circuit court refiled.
"	" 25.	Motion to petition for removal filed.
"	Oct. 3.	Hearing on motion to petition for removal overruled; case ordered removed to the circuit court of the United States. J. 38, p. 60.

3 *Journal Entries.*

J. 37, p. 4, May Term, May 6th, '89.

WILLIAM LEWIS' GUARD.
vs.
AMERICAN TUBE AND IRON CO. } 282. 15190. C. A.

Leave is granted parties to take depositions herein.

J. 37, p. 53, May Term, May 24, '89.

WILLIAM LEWIS' GUARD.
vs.
AMERICAN TUBE & IRON CO. } 282. 15190. C. A.

Leave is granted plaintiff to file amended petition, by consent of parties, which is done.

J. 37, p. 111, May Term, June 6th '89.

WILLIAM LEWIS' GUARD.
vs.
AMERICAN TUBE & IRON CO. } 262. 15190. C. A.

Leave is granted defendants to answer amended petition herein 10 days after term, and this cause is continued.

4 J. 38, p. 60, Sept. Term, Oct. 3, '89.

WILLIAM LEWIS' GUARD.
vs.
AMERICAN TUBE & IRON COMPANY. } 210. 15190. C. A.

This cause came on for hearing on motion to the petition for the removal of this case to the circuit court of the United States, which motion, being heard and understood by the court, the same is overruled.

Thereupon the defendant, The American Tube and Iron Company, having filed on Sept. 16, 1889, its petition for the removal of this case to the circuit court of the United States for the northern

district of Ohio, and having filed on the 20th day of Sept., 1889, a bond, with good and sufficient surety, pursuant to statute, which bond is hereby approved, thereupon the court, finding that the said defendant is a citizen and resident of the State of Ohio, and that the plaintiff is a citizen and resident of the State of Ohio, and that defendant is entitled to such removal, do hereby accept said petition and bond and order that said cause be removed for trial into the next circuit court of the United States for the northern district of Ohio, eastern division, pursuant to the statutes of the United States, and all further proceedings in this court in said case are hereby stayed, unless said case be remanded to this court for trial and determination herein; to all of which said plaintiff excepts.

5 THE STATE OF OHIO, } *ss:*
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, a Minor, Plaintiff,
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant. } Petition.

The plaintiff says that he is the duly appointed and legally qualified and acting guardian of the estate of William Lewis, a minor; that the defendant, The American Tube and Iron Company, is a corporation organized and incorporated under the laws of the State of Pennsylvania, and doing business as such corporation in the State of Ohio; that it was such corporation and was doing business as such in the State of Ohio on the 18th day of November, A. D. 1887, and for a long time prior thereto, and has so continued to be such corporation and to run and operate at Youngstown, in the county of Mahoning and State of Ohio, an extensive manufactury and mill for the manufactureing of iron tubes and pipes from the before-said 18th day of November, 1887, until the present time.

The plaintiff says that on the 18th day of November, 1887, his said ward, William Lewis, was and had been for a long time prior thereto in the employ of said defendant; that while so in defendant's employ, as aforesaid, said defendant, by its agent and employee, to wit, one Smeltz, who was manager and superintendent of
6 that portion of that mill in which said William Lewis was then engeged and who was boss and superintendent of a gang of employees of which said William Lewis was a member, directed said William Lewis to go to a place in said mill and manufactury by the side of and near to a set of cog-wheels, gearing, and machinery and pick up and remove certain iron balls which had fallen there, said balls being used in the construction of said iron tubes and pipes; that said cog-wheels, gearing, and machinery were in rapid motion and had no railing, guard, or protection around them to prevent them from catching and injuring employees who might come, in the performance of their duties, in close

proximity to them; that said balls which the said William Lewis was ordered by the boss and superintendent aforesaid to pick up and remove had fallen near to and under said cog-wheels and machinery; that while the said William Lewis was engaged as aforesaid in the discharge of his duties as aforesaid, and in complying with the direction of the superintendent aforesaid, without fault or negligence on his part, the said cog-wheels and machinery caught his coat and pulled his left arm into and between said cog-wheels and crushed the said arm off at the elbow, so that the said arm had to be amputated between the elbow and shoulder, and crushed, bruised, and lascerated his breast, side, and face and internally injured the said William Lewis.

That said injuries are permanent and will render the said William Lewis crippled and helpless during all of his life; that said William Lewis was rendered sick and weak by reason of the loss of blood in consequence of said mutilation and said injuries and was compelled to have employed for him nursing and medical
7 treatment for a long period of time, and was compelled to expend large sums of money in seeking to cure himself and allay the pain and suffering occasioned by the injuries aforesaid; that he has suffered by reason of said injuries great pain and anguish of mind, and that said injuries are of such a nature as to greatly shorten his life and cause him great suffering and pain all the remainder of his life, and to incapacitate him for the performance of manual labor.

This plaintiff says that his said ward, William Lewis, was at the time of receiving his injuries herein complained of a child of tender years, to wit, of about the age of 12 years; that the place where he was engaged as aforesaid in picking up and removing balls under the directions of the said defendant's superintendent, as hereinbefore alleged, was a dangerous and hazardous place, and the said work and labor was of an extremely dangerous and hazardous character, as the defendant and its said agent well knew; that defendant was guilty of gross negligence and carelessness in so directing and ordering the said William Lewis to pick up and remove said balls at and from said dangerous and hazardous place and in permitting him so to do.

And plaintiff further says that defendant should, in the exercise of ordinary care and prudence, have protected the gearing, cog-wheels, and machinery aforesaid by a railing, covering, or guard, so as to prevent them from injuring its employees, and plaintiff avers that the defendant was guilty of gross negligence in
8 failing and neglecting to protect its employees and his said ward, William Lewis, from said gearing, cog-wheels, and machinery by a railing, covering, or guard as aforesaid.

Plaintiff further says that by reason of the wrongful, careless, negligent, and reckless conduct of said defendant, hereinbefore complained of, his said ward, William Lewis, has been injured and damaged in the sum of twenty thousand ($20,000.00) dollars; wherefore he prays judgment against said defendant for said sum of

twenty thousand dollars and interest thereon from said 18th day of November, A. D. 1887.

By A. J. WOOLF AND
KING & McVEY,
Plaintiff's Att'ys.

THE STATE OF OHIO, } ss:
Mahoning County, }

Owen Evans, being by me first duly sworn, on oath says that the allegations and statements of the foregoing petition are true, as he verily believes.

OWEN EVANS.

Sworn to before me and subscribed in my presence this — day of June, A. D. 1888.

A. J. WOOLF,
Notary Public.

OWEN EVANS, Guar., &c.,
vs.
THE AMERICAN TUBE AND IRON CO. } Precipe.

To clerk:

Issue summons to the defendant, returnable according to law, endorsed "Amount claimed as dameges for personal injuries received, $20,000," and interest thereon from November 18th, 1889.

A. J. WOOLF AND
KING & McVEY,
Att'ys for Pl'ff.

9 THE STATE OF OHIO, } ss:
Mahoning County, }

To the sheriff of Mahoning county:

You are commanded to notify the American Tube & Iron Company that it has been sued by Owen Evans, guardian of William Lewis, a minor, in the court of common pleas of Mahoning county, and that unless it answer by the 14th day of July, A. D. 1888, the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 25th day of June, A. D. 1888.

[SEAL.] Witness Z. P. Curry, clerk of said court, and the seal thereof, at Youngstown, this 12th day of June, A. D. 1888.

Z. P. CURRY, *Clerk.*

Endorsed: No. 15190. Mahoning common pleas. Owen Evans, guard. of Wm. Lewis, a minor, against American Tube & Iron Company. Summons. Amount claimed, $20,000.00, with interest from Nov. 18th, 1887. Returnable June 25, 1888. Returned and filed June 25, 1888. Z. P. Curry, clerk. Woolf and Clark, King & McVey, plaintiff's attorneys.

Sheriff's Return.

THE STATE OF OHIO, } ss:
Mahoning County, }

Received this writ June 12th, A. D. 1888, and, pursuant to its command, on the 23rd day of June, A. D. 1888, I served the
10 within-named def't, The American Tube and Iron Co., by delivering *a* J. H. Matheson, ass't sup't of said company, a true and certified copy thereof, with the endorsements thereon, after having failed to find the president, vice-president, sec'y, treasurer, chairman of board of directors, or any other managing officer of the within-named company.

ELI B. WALKER, *Sheriff,*
By W. P. PRINDLE, *Dep'ty.*

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, }
vs. } Answer.
THE AMERICAN TUBE AND IRON COMPANY. }

The defendant for answer herein says that it is admitted that said defendant is a corporation as alleged; that plaintiff, Owen Evans, is the duly appointed and qualified guardian of said William Lewis; the said William Lewis is a minor; that at the time stated the said William Lewis was in the employ of the defendant, and at the time alleged he was injured, but not in the manner nor to the extent alleged. The defendant denies each and every other allegation, statement, and averment in the petition contained.

In further answer the defendant says that said William Lewis received his injuries complained of solely by reason of his own gross carelessness and negligence, and not on account of any want of care or any negligence on the part of the defendant — of any of its employees.

SANDERSON & LADD,
Att'ys for Def't.

11 THE STATE OF OHIO, } ss:
Mahoning County, }

James H. Matheson, one of the members of the American Tube and Iron Company, by me first duly sworn, on oath says that the allegations and statements of the foregoing answer are true as he verily believes.

JAS. H. MATHESON.

Sworn to before me and subscribed in my presence this 4th day of September, A. D. 1888.

JOHN A. LADD,
Notary Public.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, a Minor, Plaintiff,
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant. } Reply.

The plaintiff, for reply to defendant's answer, says that he denies the following allegations of said answer, to wit: "The defendant company avers that said William Lewis received his injuries complained of solely by reason of his own gross carelessness and negligence and not on account of any want or care or any negligence on the part of defendant or any of its employees;" and, having fully replied, plaintiff prays judgment as prayed in his petition.

A. J. WOOLF AND
KING & McVEY,
Attorneys for Pl'ff.

12 THE STATE OF OHIO, } ss:
Mahoning County, }

Owen Evans on oath says that the statements contained in the foregoing reply are true as he verily believes.

OWEN EVANS.

Sworn to by said Owen Evans before me and signed by him in my presence this 7th day of May, A. D. 1889.

A. J. WOOLF, [SEAL.]
Notary Public.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

LEWIS'S GUARDIAN
vs.
AMERICAN TUBE AND IRON CO. } Petition for Removal.

To the honorable court of common pleas of Mahoning county, Ohio:

Your petitioner, The American Tube and Iron Company, represents that the above-entitled suit was brought and begun against your petitioner in the court of common pleas of Mahoning county, Ohio, on the 12th day of June, 1888; that said suit is still pending in said court, no trial of the same has been had, and that in said suit there is a controversy between said plaintiff, Lewis' Guardian, and your petitioner; that at the same time when said suit was brought and at the present time said plaintiff was and is a citizen and residence of the State of Ohio, and your petition-, American Tube and Iron Company, defendant, was and is a citizen of the

State of Pennsylvania, and then was and now is a corpora-
13 tion organized, incorporated, and doing business under and by virtue of the laws of the State of Pennsylvania; that the matter in dispute in said suit and in said controversy exceed-, exclusive of interest and cost, the sum of two thousand dollars.

Your petitioner further says that it has reason to believe and does believe that from prejudice and from local influence it will not be able to obtain justice in said court of common pleas or in any other court of said State of Ohio to which it has a right, on account of said prejudice or local influence, to remove said cause, and your petitioner desires to remove said suit into the circuit court of the United States for the northern district of Ohio, eastern division, in pursuance of the act of Congress in that behalf provided, to wit:

The act approved March 3rd, 1887, entitled An act to amend an act of Congress approved March 3rd, 1875, entitled An act to determine the jurisdiction of circuit courts and to regulate the removal of causes from State courts and for other purposes, and further regulate the jurisdiction of the circuit court- of the United States and for other purposes.

Your petitioner further says that it has filed the affidavit required by the statute in such cases, and offers herewith its bond, executed by the American Tube and Iron Company and George H. Macher and L. D. Bols, of Youngstown, Ohio, as sureties, in the penal sum of five hundred dollars, conditioned as by statute required.

Your petitioner therefore prays that said bond may be accepted as good and sufficient according to the act of Congress, and that said suit may be removed into the circuit court of the United
14 States in and for said northern district of Ohio, eastern division, pursuant to the act of Congress in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

SANDERSON & LADD,
Attorneys for American Tube and Iron Company.

STATE OF OHIO, *Mahoning County,* } *ss:*

In the Court of Common Pleas.

LEWIS' GUARDIAN *vs.* AMERICAN TUBE — IRON COMPANY. } Affidavit.

THE STATE OF OHIO, *Mahoning County,* } *ss:*

—, Jas. H. Matheson, assistant superintendent, being first duly sworn, do say that I am assistant superintendent of the American Tube and Iron Company, having in charge the Youngstown mill, American Tube and Iron Company, and that said American Tube and Iron Company is the defendant in the above-entitled cause, and

that I have control of the litigation involved in said cause for said company and am authorized to make this affidavit.

That I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe; that defendant is a corporation of the State of Pennsylvania, with its principal office at Middletown,
15 Dauphin county; and I further say that I have reason to believe and do believe that from prejudice and from local influence said American Tube and Iron Company will not be able to obtain justice in said State court or in any other State court to which it has the right, on account of said prejudice or local influence, to remove said cause, and that plaintiff is a resident of the State of Ohio.

I further say that said American Tube and Iron Company will not be able to obtain justice in said court of common pleas or in any other State court to which it has under the laws of the State of Ohio the right, on account of such prejudice or local influence, to remove said cause.

JAS. H. MATHESON.

Subscribed by the said James H. Matheson in my presence and by him sworn to before me this 16th day of May, A. D. 1889.

JOHN A. LADD, [SEAL.]
Notary Public.

STATE OF OHIO, *Mahoning County,* } ss:

In the Court of Common Pleas.

LEWIS' GUARDIAN, Plaintiff,
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant.

Bond for Removal to United States Circuit Court.

Know all men by these presents that we are held and firmly bound unto Lewis' guardian, of Mahoning county, Ohio, in the sum of five hundred dollars, lawful money, to be paid to said Lewis' guardian, his successors or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs,
16 executors, and administrators, firmly by these presents.

The condition of this bond is such that whereas the said Lewis' guardian did, on the — day of ——, A. D. 18—, file his petition in the court of common pleas of Mahoning county, Ohio, against the said American Tube and Iron Company to recover the sum of—;

And whereas the same is now pending in said court of common pleas, and the said American Tube and Iron Company, defendant in said action, has this — filed its petition in said court to remove said action therefrom to the circuit court of the United States for the northern district of Ohio, eastern division:

Now, if the said defendant, The American Tube and Iron Company, shall enter in said circuit court, on the first day of its next term,

a copy of the record in said suit so commenced by the said Lewis' guardian, and shall pay all costs that may be awarded by the said circuit court if the said circuit court shall hold that this suit has been improperly or wrongfully removed, and shall then appear and enter special bail in the said suit, and shall do or cause to be done such other appropriate — acts of Congress providing for the removal of causes from State court- of the United States, may be required to be done by it, then the above obligation is to be null and void; otherwise to be and remain in full force and effect.

Witness our hands and seals at Youngstown, Ohio, the
17 16th day of May, A. D. 1889.

JAMES H. MATHESON. [SEAL.]
S. D. BOLES. [SEAL.]

Signed and sealed in the presence of—
W. L. KAUFFMAN.
W. E. CAMP.

The above bond is hereby accepted and approved.
Dated the 16th day of May, A. D. 1889.

T. I. GILLMER,
Judge Court of Common Pleas, Ninth Judicial District of Ohio.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of Willie Lewis, a Minor, } Amended
vs. } Petition.
THE AMERICAN TUBE AND IRON COMPANY, Defendant. }

Plaintiff by leave of court files this his amended petition herein and says that he is the duly appointed and legally qualified and acting guardian of the estate of William Lewis, a minor; that the defendant is a corporation organized and incorporated under the laws of the State of Pennsylvania and was at all of the times hereinafter mentioned and now is such corporation, and was at all said times and now is engaged in doing business and running and operating an extensive mill and factory for the manufacture of iron tubes and pipes near the city of Youngstown, in the county of Mahoning and State of Ohio; that on or about the — day of July, A. D. 1887, plaintiff'- ward, William Lewis, was a child of tender years, to
18 wit, of the age of eleven years and five months, as defendant well knew; that defendant, on said — day of July, A. D. 1887, wrongfully and unlawfully employed the said William Lewis to work in the said factory and establishment for the manufacture of iron tubes and pipes; that the said William Lewis entered into the defendant's service under said unlawful employment on said — day of July, A. D. 1887, and was ordered and directed by the defendant, *to* its duly authorized foreman and superintendent, to work in said factory and establishment at the business of "door-pulling,"

or raising or lowering the doors of the furnaces of said factory in such a manner as to permit the pipes and tubes in process of manufacture to pass in and out of said furnaces; that said William Lewis continued in defendant's service under the said unlawful employment and engaged at the said business of "door-puller" aforesaid until the 18th day of November, A. D. 1887, during all of which time he was directed in and about his said work by one Daniel W. Smeltz, who was at all said times the defendant's manager and superintendent of that portion of the mill in which said William Lewis works, and who was at all of said times the boss and superintendent of a gang of employees of which said William Lewis was a member; that on the 18th day of November, A. D. 1887, at or about the hour of — o'clock a. m., when said William Lewis was engaged at the said business of "door-puller," and when said Daniel W. Smeltz was still acting as defendant's boss and superintendent as aforesaid and ordering and directing the said William Lewis and other employees of defendant in and about their work in said factory,

19 and while the said William Lewis was still a child, under the age of twelve years as aforesaid, and serving defendant under the illegal and unlawful employment aforesaid, said defendant, by and *and* through its said for-man and superintendent, Daniel W. Smeltz, unlawfully, negligently, and carelessly ordered and directed said William Lewis to leave the place in said factory where he was engaged at said business of "door-puller," and ordered and directed him to go to a place in said mill and factory by the side of and near to a set of cog-wheels, gearing, and machinery and pick up and remove certain metal balls which had fallen and rolled close to and under said cog-wheels, gearing, and machinery, said metal balls being used in the construction of said iron tubes and pipes; that said cog-wheel, gearing, and machinery at said time were in rapid motion and no railing, guard. or covering of any kind had been placed upon or around the same; that the place where said balls were lying was in a narrow and limited space and in dangerous proximity to the cog-wheels, gearing, and machinery aforesaid, all of which the defendant well knew; that in complying with said order and direction of defendant as aforesaid said William Lewis was compelled to go very near to said dangerous cog-wheels, gearing, and machinery and to work in dangerous proximity thereto; that the business of picking up and removing said metal balls was of an extremely dangerous character, which the defendant well knew; that the said William Lewis, by reason of his youth and want of experience, did not know and had not capacity to comprehend the dangerous and hazardous character of said work and

20 was ignorant of said danger, all of which defendant well knew; that the defendant, wholly disregarding its duty in that behalf, carelessly and negligently failed at said time or at any time to advise or warn said William Lewis of the dangerous and hazardous character of said work; that while said William Lewis was engaged in picking up and removing the metal balls aforesaid in compliance with the unlawful, negligent, and careless order and direction of the defendant aforesaid, without any fault or

negligence on his part, his clothes were caught by the said cog-wheels, gearing, and machinery, and his left arm was pulled into and between said cog-wheels and machinery and broke and crushed at and below the elbow thereof, so that the same had to be and was amputated between the elbow and shoulder thereof, and crushed, bruised, and lacerated his breast, side, and face, and internally injured and permanently disfigured him, the said William Lewis; that said injuries are permenent and will render said William Lewis crippled and helpless during all of his life; that said William Lewis was renedered sick and weak by reason of said injuries and mutilation aforesaid and the loss of blood resulting therefrom, and was compelled to employ nursing and medical treatment for a long period of time, and was compelled to expend large sums of money in seeking to cure himself and allay the pain and suffering caused by the injuries aforesaid; that the said William Lewis has suffered by reason of said injuries great pain and anguish of body and mind, and the said injuries are of such a character as greatly to shorten his life, to cause him great bodily suffering and mental
21 anguish during all of the remainder of his life, to permanently unfir him for the performance of manual labor, and to require him to expend large sums of money in future to allay the pain and suffering resulting therefrom.

Plaintiff avers that said defendant was guilty of unlawful acts toward the said William Lewis and guilty of negligence and carelessness of his rights in its engagement of him as aforesaid and in its continuing him in its employment during the aforesaid time in its said factory and establishment while he was of an age of less than twelve years; that said defendant was guilty of carelessness and negligence in ordering and directing said William Lewis away from the place in said factory where he was at work as "door-puller 2" as aforesaid, and in ordering and directing said William Lew-s to work in said extrem-ly hazardous and dangerous place at and near the cog-wheels, gearing, and machinery aforesaid, the said William Lewis having had no experience in picking up and removing the metal balls aforesaid, and being incapable, by reason of his extreme youth, to comprehend and appreciate the dangers of said place and the hazards incident to said work, all of which the defendant well knew; that the defendant was guilty of gross negligence and carelessness in failing to advise and warn said William Lewis of the extreme danger of said place where said balls were flying and of the dangers and hazards necessarily incident to the work*ing* of picking up and removing said balls; that defendant was guilty of gross negligence and carelessness in failing and neglecting to provide a railing, covering, or guard around and over said
22 cog-wheels, gearing, and machinery so as to prevent the same from injuring the said William Le-is and its other employees.

Plaintiff further says that the said William Lewis, in his efforts to comply with the said orders of defendant and in attempting to pick up and remove said metal balls as directed to do by said defendant, as hereinbefore stated, exercised ordinary care and prudence

and was guilty of no negligence or carelessness which contributed to the injuries aforesaid.

Plaintiff further says that the injuries of said William Lewis hereinbefore complained of were the direct and approximate result of the defendant's unlawful acts and of the defendant's negligence and carelessness, as hereinbefore stated; that by reason of said unlawful, careless, negligent, and reckless conduct of defendant the said William Lewis has been injured and damaged in the sum of twenty thousand dollars ($20,000).

Wherefore plaintiff, as guardian as aforesaid, prays judgment against the defendant for said sum of twenty thousand dollars ($20,000) and interest thereon from said 18th day of November, A. D. 1887, and for costs.

By A. J. WOOLF AND KING AND McVEY,
Plaintiff's Attorneys.

THE STATE OF OHIO, } ss:
Mahoning County, }

Owen Evans, guardian of William Lewis, plaintiff herein, being by me first duly sworn, deposes and says that the statements
23 and allegations of and contained in his above and foregoing amended petition are true, as he believes.

OWEN EVANS.

Subscribed in my presence and sworn to before me by said Owen Evans this 24th day of May, A. D. 1889.

JOHN E. McVEY,
Notary Public.

OWEN EVANS, Guardian of William Lewis, } Answer to Amended
vs. Petition.
THE AMERICAN TUBE AND IRON COMPANY. }

The defendant, for answer to the amended petition herein, says that it is admitted that said Owen Evans is the duly appointed and acting guardian of William Lewis; that said William Lewis is a minor; that the defendant company is a corporation; that the defendant at the time stated and now is engaged in conducting the business and oper-ing the manufacturing establish*ed* mentioned at the place stated; that at or about the time stated William Lewis was in the employ of the defendant company, and *that at or about the time stated said William Lewis was in the employ of the defendant company, and* that at or about the time stated he was injured, so that his arm was subsequently amputated.

In further answering, the defendant company denies each and every statement, averment, and allegation contained in said amended answer not hereinbefore specifically admitted.

24 For further answer to said amended petition the defendant company avers that the injuries sustained by said William Lewis, as above admitted, were the result of his own negligence and

want of care at the time he was injured and not the result of any negligence *of any negligence* on the part of the defendant company.

SANDERSON & NORRIS,
Attorneys for Defendant.

STATE *State* OF OHIO, }
Mahoning County. }

T. W. Sanderson, being duly sworn, says that he is one of the defendant company's attorneys herein; that said defendant is a corporation; that he believes the facts stated in the foregoing answer to be true.

T. W. SANDERSON.

Sworn to and subscribed by the said T. W. Sanderson before me this 19th day of August, 1889.

GEORGE G. ROSE,
Notary Public.

THE STATE OF OHIO, }
Mahoning County, } *ss:*

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, a Minor, Plaintiff, }
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant. }

Reply to the Answer to Amended Petition.

25 This plaintiff now comes and, for reply to the answer of the defendant to the amended petition herein filed, says that he denies the following allegation of said answer, to wit:

"The defendant company avers that the injuries sustained by said William Lewis, as above admitted, were the result of his own negligence and want of care at the time he was injured and not the result of any negligence on the part of the defendant."

And, having fully replied, this plaintiff prays judgment as prayed in its said petition.

By A. J. WOOLF AND KING & McVEY,
Plaintiff's Attorneys.

STATE OF OHIO, }
Mahoning County, } *ss:*

Owen Evans, being by me first duly sworn, deposes and says that the allegations of the above and foregoing reply are true, as he verily believes.

OWEN EVANS.

Sworn to before me and subscribed in my presence this 9th day of September, A. D. 1889.

A. J. WOOLF,
Notary Public.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

26 LEWIS' GUARDIAN
vs.
AMERICAN TUBE AND IRON CO. } Petition for Removal.

To the honorable court of common pleas of Mahoning county, Ohio:

Your petitioner, the American Tube and Iron Company, represents that the above-entitled suit was brought and begun against your petitioner in the court of common pleas of Mahoning county, Ohio, on the 12th day of June, 1888; that the said suit is still pending in said court, no trial of the same has been had, and that in said suit there is a controversy between said parties plaintiff, Lewis' guardian and your petitioner; that at the same time when said suit was brought and at the present time said plaintiff was and is a citizen and resident of the State of Ohio; and your petitioner, American Tube and Iron Company, defendant, was and is a citizen of the State of Pennsylvania, and there was and now is a corporation organized, incorporated, and doing business under and by virtue of the laws of the State of Pennsylvania.

That the matter in dispute in said suit and in said controversy exceed-, exclusive of interest and cost, the sum of two thousand dollars.

Your petitioner further says that is has reason to believe and does believe that from prejudice and from local influences it will not be able to obtain justice in said court of common pleas or in any other court of said State of Ohio to which it has a right, on account of said prejudice or local influences, to remove said
27 cause, and your petitioner desires to remove said suit into the circuit court of the United States for the northern district of Ohio, eastern division, in pursuance of the act of Congress in that behalf provided, to wit:

The act approved March 3rd, 1887, entitled An act to amend an act of Congress approved March 3rd, 1875, entitled An act to determine the jurisdiction of circuit courts and to regulate the removal of causes from State courts and for other purposes, and further regulate the jurisdiction of the circuit court- of the United States and for other purposes.

Your petitioner further says that it has filed the affidavit required by the statute in such cases, and offers herewith its bond, executed by American Tube and Iron Company and Jas. H. Matheson and S. D. Boles, of Youngstown, Ohio, as sureties, in the penal sum of five hundred dollars, conditioned as by statute required.

Your petitioner therefore prays that said bond may be accepted as good and sufficient according to the act of Congress, and that said suit may be removed into the circuit court of the United States in

and for said northern district of Ohio, eastern division, pursuant to the act of Congress in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

SANDERSON, NORRIS AND LADD,
Attorneys for American Tube and Iron Company.

THE STATE OF OHIO, } ss:
Mahoning County, }

28 In the Court of Common Pleas.

LEWIS' GUARDIAN
vs.
AMERICAN TUBE AND IRON COMPANY. } Affidavit.

THE STATE OF OHIO, } ss:
Mahoning County, }

—, James H. Matheson, assistant superintendent of American Tube and Iron Company, being first duly sworn, do say that I am the assistant superintendent of the American Tube and Iron Company, having in charge the Youngstown mill, American Tube and Iron Company, and that said American Tube and Iron Company is the defendant in the above-entitled cause, and that I have control of the litigation involved in said cause for said company and am authorized to make this affidavit; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily beleive; that defendant is a corporation of the State of Pennsylvania, with its principal office at Middletown, Dauphin Co.; and I further say that I have reason to beleive and do beleive that from prejudice and from local influence said American Tube and Iron Company will not be able to obtain justice in said State court or in any other State court to which it has the right, on account of said prejudices or local influences, to remove said cause; that the plaintiff is a resident of the State of Ohio. I further say that said American Tube and Iron Company will not be able to obtain justice in said court of
29 *justice in said court of* common pleas or in any other State court to which it has, under the laws of said State of Ohio, the right, on account of such prejudice or local influences, to remove said cause.

JAMES H. MATHESON.

Subscribed by said Jas. H. Metheson in my presence and by him sworn to before me this 14th day of September, A. D. 1889.

JOHN A. LADD,
Notary Public.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

WILLIAM LEWIS'S GUARDIAN, Plaintiff, }
vs. } Motion.
THE AMERICAN TUBE & IRON COMPANY, Defendant. }

The plaintiff now comes and moves the court to strike from the files in this cause the paper entitled "petition for removal," and filed September 16th, 1889, and also to strike from the files in this case the paper entitled "bond for removal to United States circuit court," and endorsed "filed May 16th, 1889—Z. P. Curry, clerk," and "refiled Sept. 20th, 1889—Curry, clerk," and for cause for this motion says that there was not at any of the times hereinbefore mentioned and is not now any legal provision or authorty for the filing of said papers or either of them.

A. J. WOOLF AND KING & McVEY,
Att'ys for Pl'ff.

Endorsed: Motion. Filed Sept. 25th, 1889. Curry, cl'k.

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas within and for the County of Mahoning and State of Ohio.

OWEN EVANS, Guardian of William Lewis, a Minor, Plaintiff, }
against }
THE AMERICAN TUBE AND IRON COMPANY, Defendant. }

The plaintiff will take notice that on Friday, the 19th day of October, A. D. 1888, the above-named defendant will take the depositions of sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of Sanderson & Norris, in the city of Youngstown, county of Mahoning and State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

SANDERSON & LADD,
Attorneys for Def't.

I acknowledge service of the above notice by copy this 16th day of October, 1888.

KING & McVEY,
Attorney- for Pl'ff.

31 Deposition of a witness taken before me, a notary public of the county of Mahoning, State of Ohio, in a cause pending in the court of common pleas of Mahoning county, State of Ohio, wherein William Lewis' guardian is plaintiff and The American Tube and Iron Company is defendant, pursuant to the annexed notice, and at the time and place therein mentioned, to be read as evidence in behalf of the defendant on the trial of the aforesaid cause.

Present: L. W. King and A. J. Woolf, on behalf of plaintiff; Sanderson & Norris and J. A. Ladd, on behalf of defendant.

DANIEL SMELTZ, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says as follows:

Examination by Gen SANDERSON:

Q. 1. State your age and present place of residence.

A. No. 17 East Front street, Youngstown, Ohio.

Q. 2. State whether at any time you *are* in the employ of the defendant company, and, if so, when and in what capacity were you employed.

A. Foreman of the American Tube and Iron Company since they started to make pipe, about two years ago now.

Q. 3. Up to what time?

A. Up until within two or three weeks ago—two weeks ago.

Q. 3. State whether you are now in the employ of the defendant company.

A. No, sir.

Q. 5. State in what capacity you acted while in the employ of the defendant.

32 A. Foreman—night foreman of the mill.

Q. 6. What were your duties as night foreman of the mill?

A. My duties there were to place the men in proper position to get out as much work as the furnaces would turn out. I — that *that* is about as near as I can answer that.

Q. —. About how many men did you ordinarily have — your superintendence?

A. Well, somewhere in the neighborhood of 100, I should judge.

Q. 8. Are you acquainted with William Lewis?

A. Yes, sir.

Q. 9. How long have you known him?

A. Well, probably 18 months. I don't remember when he came to work there. He worked there for quite awhile; worked every other week under me. One week he worked days and the other week nights. When he worked nights he worked under me.

Q. 10. You may state whether he was in the employ of the defendant company during the time that you were with the company.

A. Yes, sir.

Q. 11. At what work was he engaged?

A. His work was to pull the doors—to hoist the doors of the furnace.

Q. 12. Please explain a little more as to what his duties were and how these furnaces are constructed and arranged.

A. Well, the furneces—that furnace is 23 feet in length, and they have two small doors, and in order to keep the heat in the furnace we have a boy there to hoist and lower *and* the doors, which is his work, just as the workman wants to shut his work in or out, and on this time we were working on small work and it was left up.

33 It was his duty then to watch the welder so he did not shove out his work onto the boy, and pass the balls on up by this pulley. You know there is a ball on the end of it, and a boy there to shove it in the rolls, but in this case of this kind always use this door boy to watch the welder to rake up and scrape out and help the other boy, because the work is quick and the welder is liable to shove it out, you know, before they get it, and get the right end of the ball into the rolls.

Q. 13. In what way—that is, by what appliances did the boy open and shut the doors?

A. There is a pulley and weight; just simply — it with his hand or put his foot on it if he wanted to work it.

Q. 14. About what distance was he away from the doors that he was expected to open or close?

A. Well, he — just been away from the doors; well, about ten feet this particular night.

Q. 15. You are speaking of the night he was injured?

A. Yes, sir.

Q. 16. In and about the performance of his duties, was he required to sit or stand?

A. He could do as he pleased about it; he could sit if he wanted to; there is a box right there for him to sit upon.

Q. 17. You say he worked the appliances by means of which the doors were closed and opened in what way?

A. Just simply—there is a counter-balance there—took hold of a chain with his hand.

Q. 18. In what part of the mill on the night of the injury was he injured?

A. He should have been watching the welder.

34 (Plaintiff objects to the answer.)

Q. 19. Were you there on the night he was injured?

A. Yes, sir.

Q. 20. How shortly before he received injury did you last see him?

A. Well, that I can't tell you; probably might have been 15 minutes, or might have been half an hour.

Q. 21. When you last saw him before his injury, where was he—in what part of the mill?

A. Right where I placed him.

Q. 22. Where was that?

A. Watching the welder between the furnaces.

Q. 23. You may state where that was—the place where his work required him to be?

A. Yes, his work required him to be there.

Q. 24. Was he engaged that night in the business of opening and shutting the doors?

A. No, sir; he was engaged in watching the welder; it wasn't necessary to use the doors that night.

Q. 25. Where was the welder employed with reference to where he was?

A. Oh, well, his place out in the pit; what we term in the mill.

Q. 26. How far away from Lewis was he employed?

A. Was anywhere from 20 to 30 feet; he could not have been away from him where he could not see the ball boy and welder; didn't matter particularly where he was, so he was between
35 the two furnaces there—anywhere he might stop the welder.

Q. 27. State what you mean by watching the welder. What particular duties was there in and about watching him?

A. Just simply this, the welder on small work—the boy places the ball on the rod and is liable to have his hand there, the welder shoving out the pipe or flue before this ball gets into the rolls.

Q. 28. You may state what the boy has to do.

A. He simply throws up his hand and hollows "whoa." He stands there then, and the welder has got to watch the boy and he has got to watch until the boy hollows "go ahead."

Q. 29. Did you see Lewis that night after he was injured?

A. Yes, sir.

Q. 30. About when, with reference to the time he received his injuries?

A. Oh, it could not have been more than a minute. I was probably—well, from where he was hurt over to the engine-house door that goes into the electric light is where I was.

Q. 31. Did you see the injury?

A. No, sir; I did not.

Q. 32. Whereabouts was he, with reference to the place he received his injuries, when you saw him afterwards?

A. I saw him about twenty feet. A man has him in his arms, and I heard the hollow and I ran right towards him. A man by the name of Wright had him in his arms. He says, "Willie caught his arm in the cogs."

Q. 33. Assuming that the boy was injured in the cog of which you refer, where was that place with reference to the place where he was at work when you saw him previously?

36 A. Well, it was anywhere—he should not have been within 40 feet of where he was hurt.

Q. 34. In what direction was the place where he was hurt from the place where he had been stationed to work?

A. It was west. The mill runs east and west. I believe he was west.

Q. 35. And the distance about how much?

A. Well, fully 40 feet.

Q. 36. What obstructions in the way of machinery or other appliances was there between the place where he was stationed to work and the place where he was injured?

A. There is a trough there and fence to keep him away from there.

A. 37. In what way did he have to go to get to that place—in what manner? How did he have to go to get there?

A. He would have to go under the welding, through or go around, probably, the pulley fence to get in there.

Q. 38. Suppose he went around by the pulley fence, what distance would he have to go to travel to the place from where he was stationed to the place he was injured?

A. He would have to go over 50 feet to go up and go around.

Q. 39. Now, you may state what were the machinery and appliances at the place where he was injured. Describe it so we will understand it.

A. Well, just a little set of gear-wheels about this size (indicating) runs with a lever that runs this rod, and it is not in motion all the time, simply while it carried the rod back and forth.

37 Q. 40. Does the gearing consist of cog-wheels working in each other?

A. Yes, sir.

Q. 41. You may state now—state whether or not on that night or at any other time you directed, requested, or ordered this boy to go to that place for any purpose?

A. No, sir.

Q. 42. You may state whether you knew he was at that place on that night until he was injured.

(Plaintiff objects to the question.)

A. I had given the boy strict orders the night before.

Q. 43. Whether you knew the night before he was injured he was there?

A. No, sir.

Q. 44. You may state, then, what knowledge, if any, you had that night that he had left his place where he was engaged at work and had gone to this place where *he was engaged at work and had gone to this place where* these cog-wheels were in operation by which he was injured.

A. The night before?

A. 45. No; that night.

A. I don't remember of saying anything to the boy that night.

Q. 46. The question is what knowledge had you that he had left the place where he was working and gone to the place where the cog-wheels were near and about which he was injured?

A. None at all.

Q. 47. You may state what, if anything, you said on any previous occasions to this boy about leaving his place where he

38 was injured or going to other parts of the mill and to this portion of the mill where he was injured.

(Plaintiff objects to the question.)

A. Well, sir, I told him the night before if he did not stay right where I put him and watch the welder that I would send him home. This is, as near as I remember, the night before; not longer than that, I know.

Q. 48. You may state whether at any other time you said anything to him upon the same subject.

(Plaintiff objects to the question.)

A. Yes; I called him out of there the night before; he was in there; I placed a man to do the work there; he was in there. I called him; I says, "Billy, I want you to come down here and watch the welder. If you don't I will send you home."

Q. 49. What did he say, if anything, in answer?

A. I don't remember that he said anything. He just went there and staid there at work. I looked for him; I found him there at the place I put him.

Q. 50. You may state what, if anything, you said to him at any time respecting the danger of the machinery going through the mill if he left his place.

A. I didn't have any occasion to, because I wouldn't put a boy where there was any danger; that is all.

Q. 51. What occasion, to your knowledge, was there for his going that night to this place where he was injured?

A. None whatever.

Q. 52. You may state whether any part of his employment or duties to which he was assigned required him to go to any
39 other portion of the mill than that at which you had stationed him.

A. No, sir; no business anywhere else.

Q. 53. You may state whether on that night you sent him to that place for any purpose whatever.

A. I didn't send him there.

Q. 54. You may state whether on that night you sent him to that place where he was injured for the purpose of obtaining a ball.

A. No, sir.

Q. 55. What did he do with reference to the balls?

A. Nothing at all.

Q. 56. What balls were those at that place?

A. Where he was injured?

A. 57. Yes, sir.

A. There was no balls there that I know of at all—at least there should not have been any balls within 20 feet of there.

A. 58. Who else, if there was any one, on that night that he received his injuries that was engaged by the defendant company and in their employ whose duty or business it was to give directions to any of the hands employed there?

A. No one but myself, that I know of, in that department.

Q. 59. In that department or portion of the mill in which the plaintiff was working on that night, you may state whether there

was any other superintendent or boss to give orders or directions to any of the workmen.

A. No, sir; none.

40 Q. 60. How long did you say it was since you ceased to be in the employ of the defendant company?

A. Last Friday night two weeks ago.

Cross-examination.

By Judge KING:

Q. 61. Where did Willie work with reference to what I suppose to be the north end of this furnace that you speak of?

A. He worked the east end of the furnace, the extreme east end.

Q. 62. The furnaces run east and west, do they?

A. Yes, sir.

Q. 63. Which end is what is called the front end, where the doors are?

A. The east end.

Q. 64. And where did Willie work with reference to where the doors are that it was Willie's business to attend?

A. He worked east of the furnace; he worked the furnace at the east end.

Q. 65. I understood you to say that when they were running small work there is no necessity for the constant attention of the door-pulled at the doors?

A. No, sir.

Q. 66. It arises out of the fact that the furnace retains enough heat even when the door is up for the small work to pass through?

A. Yes, sir.

Q. 67. When you work the door where it is necessary to lift and drop the door every time a pipe goes in and comes out?

A. Yes, sir; not necessary to raise it when pipe comes out; it is just when you shove them in you operate.

41 Q. 68. They come out of the other end?

A. Yes, sir.

Q. 69. The welding is done before the pipe goes in?

A. No, sir; after the pipe goes in and is heated it is shoved out; but the door has got to be raised before you can put the pipe in. On the small work you simply have to raise the door, probably two or three inches above where we have them all the while.

Q. 70. Then they are left remain up when you work small work for an hour or half an hour at a time, ain't they?

A. Yes, sir.

Q. 71. Now, you speak of this trough back in the neighborhood where this gearing was at which the plaintiff was injured, when different pipes went by the pipes ran back there.

A. When they were heated that is where they run.

Q. 72. Then they are just put into the furnace and heated and brought out in front and heated?

A. Shoved out through the rolls and heated; the work is run through this trough.

Q. 73. And at what I call the west end of the furnace, where the pipes are run out after they are welded, what is done there, if anything, in the way of putting these balls into the pipes—what is the operation of this ball process?

A. Well, he runs a certain size ball; he has the ball up there and he takes his ball and just slips it on the rod; as the rod comes up the bar-puller shoves the rod between the rolls.

Q. 74. That is for the purpose of keeping the pipe a certain size?

42 A. No, sir; this ball goes over the pipe to weld it.

Q. 75. Then, after the pipe is welded do these balls drop out?

A. If they don't stick in the pipe, of course.

Q. 76. As a rule, do they drop out?

A. They must drop out; it must drop off, because the rod can't get through the pipe unless the balls drop off.

Q. 77. Then they drop where the trough is?

A. Right in front of the rolls.

Q. 78. And very frequently they drop near this gearing, don't it?

A. Not within 20 feet.

Q. 79. I mean now from the west end to the end where the trough is, how far do you think it is?

A. There is no balls any business within 20 feet of that gearing.

Q. 80. I ask you how far it was from the west end of the furnace to the precise gearing where Willie Lewis's arm was torn off?

A. I can't tell you precise how far it is.

Q. 81. About how far?

A. 20 or 25 feet.

Q. 82. Then, if the ball strikes in the pipe when it runs back there it would be much nearer that gearing from the end of the furnace than the end of the pipe?

A. It can't drop there, then, because it sticks in the same pipe.

Q. 83. Do they all drop off at the same place?

A. It is owing to the length of pipe you are making.

43 Q. 84. You make different-length pipe?

A. Yes, sir.

Q. 85. How long are the longest pipe you make there?

A. We have made them 30 feet 6 inches.

Q. 86. How short are the shortest ones?

A. We have made them as short as 10 or 12 feet.

Q. 87. So the place where the ball would drop off would depend somewhere on the length of the pipe?

A. Yes, sir.

Q. 88. And the longer the pipe the nearer that place?

A. The further away.

Q. 89. The shorter pipe you were making, then, the nearer this place?

A. Yes, sir.

Q. 90. Those balls are of what shape?

A. Just about the shape of a minnie-ball.

Q. 91. They are not entirely round?
A. No, sir.
Q. 92. Those balls sometimes stick, as they call it, don't they?
A. Yes, sir.
Q. 93. And when they do that they have to be pulled off, don't they, or pulled out?
A. That is owing to the size and where it sticks; probably have to cut it—the flue off—to get the ball out.
Q. 94. When they don't stick to the pipe, how is it as to sometimes sticking to the rod?
A. It can't be done; they either have to stick in the pipe or drop off the rod.
44 Q. 95. What are the shape of those balls?
A. Cartridge-shape.
Q. 96. You have said those balls are cartridge-shape. They will roll, will they not?
A. I suppose they will roll some, *sey*.
Q. 97. As a matter of fact, they frequently do roll as they drop out of the pipe?
A. Why, certainly; if they drop they roll.
Q. 98. And they go off at the west end of the furnace, in the cut nearer to where this trough is you speak of?
A. By the rolls; this bar takes the ball at the trough, because that is where the balls drop off.
Q. 99. How far are the rolls from the trough?
A. Them rolls there is probably a foot.
Q. 100. So it is in the immediate neighborhood?
A. Which?
Q. 101. The rolls and trough.
A. Yes, sir; but not the gearing proper.
Q. 102. This trough is about how long?
A. That is about 22 or 23 feet long.
Q. 103. And the west end of that trough is about how far from this gearing where Willie was injured?
A. The west end of the trough is out a couple of feet.
Q. 104. Is it not a fact that in order to get into where this gearing is when you go around the end by the west end of the trough you are right at the gearing?
A. There is no way to get through there unless you climb over or get underneath the trough; there is a fence there.
Q. 105. Is that a stationary fence or is it a grate?
45 A. No, sir; there is a stationary fence through there.
Q. 106. When was that fence put there?
A. When the mill was put there.
Q. 107. Been there ever since?
A. Yes, sir.
Q. 108. Now, at which end of this trough do these balls drop off?
A. At the east end of the trough.
Q. 109. As I understand by your machinery there, the pipe travels back to the course of the rolls to the west end of the trough, does it not?
A. Yes, sir.

Q. 110. Now, suppose the ball sticks, as you call it, is it absolutely and universally the fact that the ball drops off at the east end or might it stick part of the way back?

A. It might stick right in front of the pipe or it might stick within an inch of the back end.

Q. 111. And if it sticks in the pipe it is liable, is it not, to — off nearer the west end of the trough?

A. If it sticks it can't drop off at all.

Q. 112. You mean if the ball sticks at all, the least bit, it is fast, then? It can never be knocked out unless chiseled out of the pipe?

A. Certainly; we can knock them out—punch them out.

Q. 113. Do you wish to be understood that the balls always, unless they stick so that they have to be punched out, drop off at the same place?

A. No, sir.

Q. 114. Explain what you do mean, if you don't mean that?

A. I mean to say if they stick at all they are in the pipes
46 of the flue, and if the flue and pipe passes over the ball it must drop at the east end of the trough, because if it don't you can't get your rod back through the pipe.

Q. 115. Suppose they do not stick in the pipe?

A. Then they drop off at the east end again.

Q. 116. Would they drop off at the east end, whether they stick or do not stick?

A. Whether they stick or don't stick, they must come off at the east end there.

Q. 117. Who was employed there as what is called "taker-off" at the time this accident occurred?

A. Now, I don't remember. He is a Swede, but I don't know his name; something like Johnson, but that is not the name. It ends with "son," but what his name was I can't state. We always called him Tom.

Q. 118. What is the fact as to the ball sometimes from the pipe dropping in the trough?

A. This frequently occurs—that they drop in the trough.

Q. 119. And when that occurs when the next pipe come- along or when the bar is drove back it would draw the ball along with it?

A. Not necessarily. He has a little hook and takes the ball out.

Q. 120. The bar coming back would throw it out of the trough, wouldn't it?

A. No, sir; not necessarily throw it out. When you pull that ball back those pulleys in the road will knock it off.

Q. 121. They drag it back and knock it off and drop it right near the place—frequently does?

47 A. Not frequently.

Q. 122. Sometimes does?

A. Very seldom.

A. 123. Have you seen it drop at times in that way?

A. I have; yes, sir; but it is an unusual occurrance that — is carried back out of the rolls at all.

Q. 124. Who was employed to gather up those balls at that time?
A. The man who gauged them.
Q. 125. Who was the ball-*gua*ger?
A. I think Jimmy O'Donovan.
Q. 126. Is he in the employ of the defendant company?
A. I think he is.
Q. 127. In the same business?
A. No, sir; I think he is running the electric light; was when I was there.
Q. 128. What is the business of the ball-*gua*ger?
A. They give the boys balls; when they want certain sized balls it — his business to give them what they come for, and it is his business to go down to the furnace and put on the small work and put them in the rapper and rap the scale off them.
Q. 129. Who was in the habit of doing this—at times assisting him in the work?
A. Nobody that I know of.
Q. Who have you seen at various times prior to this injury taking those balls away from where they drop there—pull
48 them out and take them out of there on a wheel-barrow?
A. O'Donovan.
Q. 131. Who else?
A. Nobody had any business to do it but him.
Q. 132. Who have you seen doing it besides him?
A. I can't say I ever saw anybody do it.
Q. 133. Can you say you never did see anybody else doing it?
A. Not positively; maybe the day man would be in there working an extra turn for him; he might do it at times.
Q. 134. About how large were the balls that were being used the night Willie was injured?
A. Well, they were to make a two-inch flue—in that neighborhood—two inches in diameter; a little smaller.
Q. 135. About what would a ball of that size weigh?
A. About two pounds; from a pound to two pounds; a two-inch ball would not weigh over a pound, I think.
Q. 136. So that a boy could handle that kind of a ball as well as a man—a boy of Willie's size?
A. Yes, sir.
Q. 137. About what time of night was it, according *the* the best of your recollection, when you last saw Willie before he was hurt?
A. I am not able to say; but it could not have been more than a half an hour at the very outside.
Q. 138. Where was he when you saw him?
A. He was then where I had stationed him at the sand-box; that is the last I saw of him, he was standing at the ladder by the sand-box.
Q. 139. Who was with him?
49 A. I don't remember who was with him when I saw him.
Q. 140. What conversation did you have with him?
A. Don't remember that I had any.

Q. 141. Where were you between the time you last saw him and the time of the accident?

A. I was in through the mill.

Q. 142. What part of it, if you remember?

A. When he was hurt?

Q. 143. Just before that, the preceding half hour.

A. I was right across, where you go to the engine-room. If you was down to the mill, where you go into the engine-room, where you go into the electric-light room, right at that rack I was when it occurred.

Q. 144. How is it as to being possible from where you were during the half hour to see what was going on at that point and place where the accident occurred?

A. Well, from where I was I could see everything that was going on if my attention was called in that direction.

Q. 145. Where was the ball-gauger's room with reference to where you were during this half hour?

A. At the east end of the mill. At the extreme east end of the mill is the ball-gauger's room.

Q. 146. But how was it as to its being necessary in passing from where the accident occurred to the ball-gauger's room to pass by where you were?

A. Wouldn't have to go that way at all.

Q. 147. But in a different direction?

A. Yes; in an opposite direction.

Q. 148. I will ask you whether or not you saw Willie shortly before this accident occurred with a wheelbarrow?

A. No, sir.

Q. 149. About how rapidly do these balls accumulate when you are making small work?

A. Well, that is owing to how the furnaces are working.

Q. 150. Do you remember how your furnaces were working that night?

A. Probably use 500 or 600.

Q. 151. Then they would accumulate pretty rapidly, would they not?

A. Yes; at that rate they would.

Q. 152. Do you remember when you last saw Willie the time you spoke of where the ball-gauger was?

A. No, sir.

Q. 153. Do you remember in regard to the accumulation of balls there?

A. No, sir; nothing more than ordinary.

Q. 154. These ball- were hot then—that is, they come out of the pipe hot?

A. Yes; usually hot.

Q. 155. So hot that ofttimes they have to be handled with a hook in place of your hands?

A. Yes, sir.

Q. 156. The usual method of taking these balls away from there to the ball-gauger's room is with a wheelbarrow?

A. Just take a shovel and throw them in a wheelbarrow.

Q. 157. As they accumulate around the place where they drop as they come out of the pipe, how is it as to there being in the way of parties engaged at work there at the rolls?

51 A. If the ball boy does his work right, they never get in anybody's way; there is a place to throw them, there by the side of the furnace.

Q. 158. You speak of a ball boy; is that a different person from the gauger?

A. Yes, sir.

Q. 159. Who was the ball boy there that night?

A. I don't remember who was the ball boy.

Q. 160. I will ask you whether or not it was a boy named Witherow.

A. I think that was the name.

Q. 161. I will ask you now if a short time before this accident happened you did not go back there and find Willie and this Witherow boy talking together.

A. Don't remember of it; don't remember that I did.

Q. 162. Do you mean by that answer to be understood as saying you did not or you simply don't remember whether you did?

A. I don't know whether they was talking; if I did I didn't notice it; that was all.

Q. 163. Do you remember standing yourself near this place and talking with one of the other employees, and while you was standing there talking, arresting your attention by a whistle or snap of your finger or motion of your hand?

A. Those things happen so often.

Q. 164. Then, do I understand your answer to be you don't remember whether you did it or not?

A. No, sir; I don't; don't remember doing anything of the kind; probably did it; don't know; can't say anything to the contrary.

52 Q. 165. Do you remember that in response to that motion Willie came over to where you were?

A. No, sir.

Q. 166. Do you mean by that he did not come, or that you don't remember?

A. I don't remember what occasion I would have to call him; don't remember calling him.

Q. 167. All I want to know — whether you wish to be understood you did not call him or you don't remember.

A. I don't remember.

Q. 168. You are a resident of this county?

A. Yes, sir.

Q. 170. And, so far as you know, expect to remain here?

A. Yes, sir.

Q. 171. You have made no arrangement to move out of the county at all?

A. I made arrangement to go into business here; started in last night.

Q. 172. In this city?
A. Yes, sir; got a family right here on Front street.

Re-examination.

By Gen. SANDERSON:

Q. 173. You please state whether or not you employed this boy to work in those works.
A. I think I did; I think I gave the little fellow the job.
Q. 174. If you did, about how long was that before he was injured?
A. It was quite awhile.
53 Q. 175. What do you mean by quite awhile?
A. Several months.
Q. 176. Can you state any nearer how many months?
A. No, sir.
Q. 177. You may state what he had to do with these balls in any respect?
A. Nothing in the world; he had nothing to do with them.
Q. 178. Was he at any time during the time he was employed there, to your knowledge, engageged in removing or having else to do with those balls—that is, whether you set him to doing anything with them.
A. No, sir.
Q. 179. What other duties, if any, did he have or did you assign to him than those you have mentioned in your examination-in-chief?
A. None whatever.

DANIEL SMELTZ.

STATE OF OHIO, *Mahoning County,* } *ss:*

I, B. O. Eddy, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named Daniel Smeltz was by me first sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed, as above set forth, was reduced to writing by me and also so written in the presence of the witness before me, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified.

I do further certify that I am not counsel, attorney, or rela-
54 tive of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 19th day of October, A. D. 1888.

B. O. EDDY,
Notary Public.

Cost Bill.

Writing depositions		$6 21
Issuing subpœnas		50
Swearing witness		04
		$6 75
Witness fees, Daniel Smeltz		75
Constable fees, mileage	$ 25	
Copy	25	
Service of subpœna	25	
		75
Total cost		$8 25

Received of the American Tube and Iron Company the sum in full of my fees, as above specified; also in full of constable's fees. The witness fees *was* paid by the American Tube and Iron Company.

55 *Notice to Take Depositions.*

STATE OF OHIO, }
Mahoning County. }

Court of Common Pleas.

WM. LEWIS' GUARDIAN, Plaintiff,
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant.
} Civil Action for Personal Injuries.

The defendant will take notice that on Thursday, the 9th day of May, A. D. 1889, the plaintiff above named will take the depositions of sundry witnesses, to be used in evidence on the trial of the above cause, at the office of D. E. Lynn, justice of the peace, in the village of Cortland, in the county of Trumbull, State of Ohio, between the hours of eight o'clock a. m. and 6 o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Dated May 7th, 1889.

WOOLF & KING,
Attorneys for Plaintiff.
SANDERSON & NORRIS,
Attorneys for Defendant.

Caption.

Depositions of sun*r*ey witnesses taken before me, a justice of the peace of the coun*r*t of Trumbull, State of Ohio, in a cause pending in the coun*r*t of common pleas of Mahoning county, State of Ohio, wherein Owen Evans, guardian of William Lewis, is plaintiff and The American Tube and Iron Company defendant, pursuant to the annexed notice, and at the time and place therein mentioned, to be read in evidence in behalf of the plaintiff on
56 the trial of the aforesaid cause.

Present: A. J. Woolf and L. W. King, on behalf of the plaintiff, and John A. Ladd, on behalf of the defendant.

JOHN WITHERO, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Q. 1. State your name, age, occupation, and place of residence.

A. My name is John Withero; I am fourteen years of age; I have no occupation, and my place of residence is Courtland, Trumbull county, Ohio.

Q. 2. Are you acquainted with William Lewis; and, if so, how long have you known him?

A. I am; and have known him for two years.

Q. 3. Where did you live before coming to Courtland?

A. In Lansingville, which is in Youngstown township, Mahoning county, Ohio.

Q. 4. How long did you live at Lansingville, and did you move away from there?

A. I lived at Lansingville about two years, and moved from there to this place about three or four months ago.

Q. 5. Where did you work while living at Lansingville?

A. At the tube works, for the American Tube and Iron Company.

Q. Were you working at the tube works at the time Willie Lewis was caught in the cog-wheels and had his arm torn off and was otherwise injured?

(Objected to.)

A. Yes, sir.

Q. State whether or not you were present at the tube works at the time Willie Lewis was hurt there.

(Objected to.)

57 A. Yes, sir.

Q. Do you remember the day and month he was hurt?

(Objected to.)

A. No, sir; I cannot.

Q. State whether or not you saw him on the day he was injured, before he received his injuries?

(Objected to.)

A. Yes, sir.

Q. About how long before he was injured?
A. About five minutes before.
Q. Where was he and where were you when you saw him at the time you speak of?
A. He and I were beside No. 2 furnace, near the "bosh" or iron box with water in it.
Q. Who else was present, if anybody?
A. David Bailey.
Q. What were you doing?
A. We were standing talking.
Q. Where is this bosh or iron box of the furnace, at the front or back end of the furnace?
A. At the back end of the furnace.
Q. State, if you know, what kind of tubing was being made at the furnace just before Willie Lewis got hurt; was it large or small?

(Objected to.)

A. Small; two-inch tubing.
Q. State who, if any one, came there while you and Willie Lewis — David Bailey were standing talking near the bosh.
A. Nobody came there.
58 Q. While you were standing there talking, who spoke to you or any of you?
A. No one.
Q. What, if anything, happened that you now remember before you and the other boys separated?
A. Dan. Smeltz called Willie Lewis; that was all.
Q. Please state where Mr. Smeltz was at the time you speak of and tell us what he said and what he did; describe the place he was and what he said and did as fully as you can.

(Objected to.)

A. Mr. Smeltz was standing by No. 1 furnace, about 30 feet from where we were standing; he called Willie by motioning his fingers at us and then pointing to the balls, which were below the gearing. Willie said that it was me that had to go. I said Mr. Smeltz meant him. Mr. Smeltz then motioned a second time with his fingers to Willie and again pointed to the balls under and around the gearing.
Q. What, if anything, did Willie Lewis then do?
A. He went to pick up the balls.
Q. Where was Mr. Smeltz at the time Willie went to pick up the ball- and what was he doing, if you know?
A. He was standing at No. 1 furnace.
Q. State, if you know, whether or not Mr. Smeltz could see Willie at work picking up the balls from the place where he was standing.
A. Yes, sir.
Q. Where did you go, if anywhere, when Willie went to work picking up the balls?
A. I went to the ball bins for a load of clean balls.
59 Q. About how far are those ball bins from the place where Willie was then working, and about how long were you gone?

A. About 100 feet; I was gone about ten minutes; long enough to get a load of balls and fool around awhile.

Q. State whether or not you *and* Willie when you came back, and, if you did, tell us what he was doing and where he was.

A. Yes, sir; I saw him when I came back; he was at work picking up balls.

Q. About how long did he continue at work after you came back?

A. Only about two minutes after I came back before he was hurt.

Q. State whether or not you saw him at the time he received his injuries, and, if you did, tell us how he got hurt and all you saw there.

(Objected to.)

A. I saw him at the time; he was stooped down to pick up some balls and the cog-wheels caught the side or tail of his coat and drew his arm in. Willie screamed. Sam Hubbard was excited, but he could not stop the machinery. Joseph Wright and a lot of the others came and got him out and carried him into the electric-light room.

Cross-examination.

By JOHN A. LADD:

Q. What time of day was Willie hurt?

A. About 4 o'clock in the morning.

Q. What did Willie work at?

A. Pulling doors.

Q. At what furnace was he pulling doors?

A. Number two.

60 Q. How far is the place where his work is to be done from the cogs where he was at work?

A. Forty feet.

Q. How far from the place that Willie tended door was it to where you worked?

A. About 25 feet.

Q. How far was it from the place where you worked to the cog-wheels?

A. Twenty feet.

Q. What work were you doing at that time?

A. Scaling balls.

Q. How many balls were on the ground when Willie went to pick them up?

A. I couldn't tell how many. I should think about fifteen.

Q. How much would each one weigh?

A. I couldn't tell how much.

Q. How big around are they?

A. Two inches. They were balls for two-inch tubing.

Q. Didn't you have to scale these balls afterwards?

A. Not those little ones, I didn't.

Q. Who did?

A. The ball-*guager* put them *raltler* and scaled them off in that way.

Q. Who always picked these balls up for the ball-gauger to scale?

A. The ball-gauger must pick them up himself unless the boss sends somebody to do it.

Q. Who was the ball-gauger at this time; what was his name?

61 A. I think it was James O'Donovan.

Q. How far from the cog-wheels did these balls fall from the tube?

A. About a foot.

Q. Isn't it a fact that never more than two balls fall there without being taken up by the ball-gauger?

A. There are more than two balls fall there before they are gathered up.

Q. How many more?

A. Just according to what time they come after them.

Q. What's the largest number you ever saw there at one time?

A. About forty.

Q. At the door where Willie's place was to work, could he see the cog-wheels from there if he had been at his place?

A. No, sir.

Q. How would he get from the door to the cog-wheels?

A. By going round to the north side of the furnace.

Q. How far around would he have to go to get to the cog-wheels?

A. He would need to walk out about three or four feet, and then walk down straight about 40 feet.

Q. Did you hear any one tell him before that to stay to his fornace and attend the door?

A. No, sir.

Q. Did you ever before, while you were working there, see him pick up balls at this same place?

A. No, sir.

Q. Did you at any time hear any one tell Willie to attend to his work and — fool around the mill so much?

62 (Objected to.)

A. Not that night, I didn't.

Q. You have heard them tell him that at other times, haven't you?

A. Yes, sir; but they told him that when he wouldn't get his door up in time—when it would stick.

Q. Wasn't it his place to pull the chain or wire that raised that door whenever they gave the signal?

A. They didn't give any signal; he pulled the door whenever he saw them getting the pipe.

Q. They shove the pipe in the furnace every two minutes, don't they?

A. According to what size they are working on. They were working two-inch pipe that night, and they shoved one in about every minute and a half.

Q. And each time they would shove the pipe in Willie would have to raise the door, wouldn't he?

A. Yes, sir.

Q. Who was attending the furnace door during the time that Willie was talking to you and while he was picking up the balls, which you say was about twelve minutes?

A. Nobody attended it; it was left open.

Q. Who was working at the front of the furnace at that time with the pipe?

A. There were five men; I don't remember their names. Sam. Smith was one, Percy Webber was another.

Q. Who was the welder on turn that night?

A. It was Markstron.

63 Q. It is required to raise the door each time that a pipe is put in and lower it when the pipe is in?

A. Yes, sir.

Q. Were Mr. Woolf and Willie Lewis out at your house to see you to-night?

A. Yes, sir.

Q. How far do you live from here?

A. A mile and a half.

Q. Did they bring you here with a horse and buggy to-night?

A. Yes, sir.

Q. Did Mr. Woolf tell you what he wanted you to do down here before the justice to-night?

A. He told me he wanted me to say the truth and nothing else.

Q. Didn't he say to you that he wanted you to say that you saw Willie picking up the balls?

A. No, sir.

Q. What, if anything, did he say about the balls?

A. He didn't say anything about the balls.

Q. What did he say to you?

A. He told me to tell the truth and nothing else.

Q. Tell the truth about what?

A. About what I knew of Willie's getting hurt.

Q. What did Willie say to you, if anything?

A. He didn't say anything to me about the lawsuit or about him getting hurt.

Q. Did Woolf say anything to you about the lawsuit?

A. No, sir; he just told me to tell the truth.

Q. On that night did you see the other workmen work

64 right near there; and, if so, what where their names?

A. Sam. Hubbard and Thomas Goernson are all I know.

Q. What time did you go to work that evening?

A. At 20 minutes past six, and quit work at 20 minutes of seven.

Q. What was the boy's name that worked with you that night?

A. David Bailey.

Q. Where was Bailey when you went after that load of balls?

A. I couldn't tell where he was.

Q. Who was doing the balling while Bailey was away running around?

A. He got back in time to do it himself.

Q. How long was he gone before he got back to do it?

A. I didn't see him while he was away; I couldn't see him.

Q. Doesn't he have to take the balls away every time the pipe comes through?

(Objected to.)

A. Yes, sir.

Q. And doesn't he have to place a ball on the bar every time a tube comes through?

(Objected to.)

A. Yes, sir.

Q. And the tubes comes through every minute and a half, don't they, as you said before?

A. Yes, sir.

Q. Was Bailey away while you were talking to Willie—when Willie went down to the cog-wheels?

A. Bailey was standing with us for about a minute and a
65 half before Willie went down to the cog-wheels, and he then went to put a ball on.

Q. In what part of the mill was Bailey when he was away fooling around, as you have stated?

(Objected to.)

A. In the east end.

Q. Was he gone ten or fifteen minutes?

A. He wasn't gone more than two minutes or a minute and a half.

Re-examination:

Q. In answer to a question by Mr. Ladd you say that the furnace door must be raised every time a pipe is shoved in, and lowered each time when the pipe is in. Do you mean that the door must be raised and lowered for every pipe, whether small or large? Please explain your former answer.

A. I mean for large pipe—for pipe larger than two-inch pipe.

Q. How frequently, if at all, must it be raised and lowered when they are making two-inch pipe?

A. About every minute and a half.

Q. Please explain, then, what you mean by saying that the door only needed to be raised and lowered when they were running pipe larger than two-inch pipe.

A. It took the pipes longer to get heated.

Q. Why did you think Mr. Smeltz was speaking to Willie rather than to you when he motioned with his finger and pointed to the balls?

A. Because Willie didn't have to hoist the doors on two-inch pipe and I had other work to do.

66 Q. Why didn't Willie have to hoist the door on two-inch pipe?

A. Because when they run two-inch pipe they raise the furnace door a little bit higher than the thickness of the pipe and leave it up there for about half an hour; then they change to the other side of the furnace.

Recross-examination:

Q. You say that in putting large pipe and two-inch pipe and the other pipe through they have to raise the door and let it down each time?

—. Yes; for anything above two inches they do.

JOHN WITHERO.

It is hereby mutually agreed that all the objections to this deposition because of the time or place of taking the same or of the manner of reducing same to writing are hereby expressly waived; and it is further thereby expressly agreed that this deposition may be used in evidence in the above-named case so far as the questions herein contained and the answer- thereto are competent.

L. W. KING,
Att'y for Plaintiff.
JOHN A. LADD,
Att'y for Def't.

Certificate to Depositions.

THE STATE OF OHIO, } ss:
Trumbull County, }

I, D. E. Lynn, a — in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named John Withero was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the
67 deposition by him subscribed, as above set forth, was reduced to writing by me, and also so written in the presence of the witness aforenamed and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified, and was taken on the eighth day of May, 1889, instead of the ninth day of May, 1889, by agreement of the attorneys for both the plaintiff and the defendant.

I do further certify that I am not of counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this eighth day of May, A. D. 1889.

D. E. LYNN,
Justice of the Peace.

Received of L. W. King the sum of $2.56 in full of my fees, as above-specified, and also $— in full of constable's fees. The witnesses' fees were paid by L. W. King.

D. E. LYNN, *J. P.*

68 THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas within and for the County of Mahoning and State of Ohio.

OWEN EVANS, Guardian of William Lewis, Plaintiff, }
against
THE AMERICAN TUBE AND IRON COMPANY, Defendant. }

The defendant will take notice that on Saturday, the 18th day of May, A. D. 1889, the above-named plaintiff will take the deposition of A. M. Clark and sundry witnesses, to be used as evidence on the trial of the above-entitled cause, at the office of King and McVey, in the city of Youngstown, county of Mahoning and State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

A. J. WOOLF AND
KING & McVEY,
Attorneys for Plaintiff.

I acknowledge service of the above notice by copy this 16th day of May, A. D. 1889.

SANDERSON & NORRIS AND LADD,
Attorneys for Defendant.

69 Deposition of a witness taken before me, the official stenographer of Mahoning county, State of Ohio, in a cause pending in the common pleas court of Mahoning county, State of Ohio, wherein Owen Evans, guardian of William Lewis, is plaintiff and The American Tube and Iron Company is defendant, pursuant to the annexed notice and at the time and place therein mentioned, to be read as evidence in behalf of the plaintiff on the trial of the aforesaid cause.

Present: L. W. King, on behalf of the plaintiff; T. W. Sanderson, on behalf of the defendant.

A. M. CLARK, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Q. 1. State you- name, age, occupation, and place of residence.

A. A. M. Clark; age, 32; occupation, physician; residence, Youngstown.

Q. 2. How long have you been a practicing physician?

A. For 9 years.

Q. 3. Are you acquainted with William Lewis; and, if so, how long have you known him?

A. I have known him since the time he was hurt at the tube works, which was November, 1887.

Q. 4. State, if you can, about what time in the day you saw him, and about how soon after he had been injured, if you know.

A. I am not positive about that; it rather seems to me that I saw him at the tube works soon after the accident, and that
70 I pursuaded him to go to the hospital.

Q. 5. Please describe the character and extent of the injuries from which he was suffering when you saw him.

A. He had a lascerated would of the breast, and he had the arm hurt—the soft part destroyed to a point above the elbow, and had a slight abrasion on the left cheek.

Q. 6. At whose instance or request, if you remember, did you visit him at the time mentioned?

A. I don't know who telephoned me—somebody from the office of the works there; don't know whether it was one of the office men or whether it was one of the mill men. I simply know I got a telephone calling *to* me to the tube works to see somebody that was hurt.

Q. 7. What was done at that time towards dressing his wound, and what was necessary, if anything, to be done with his arm?

A. Well, his arm and breast were dressed temporarily until he was taken to the hospital; it was simply a temporary dressing, put on to stop the flow of blood—to keep the parts from the air until permanent dressing could be put on.

Q. 8. Please state when you saw him again.

A. I saw him at the hospital on the same day—I don't remember the time of day—and there I did the amputation—removed his arm at a point a little above the elbow, and then put on a dressing over the breast; after that saw him twice a day; certainly every day as long as it was necessary, and I had charge of him all the time I was on duty at the hospital, which would run up until the first of January, 1888. Whether he left the hospital before that time or not, I am not positive, but I certainly saw him all the time that my turn was.

71 Q. 9. You may state whether or not in your judgment the injuries to his arm were of such a character as to necessitate its amputation at or about the place where it was amputated.

A. I should say so most positively or I should not have done the amputation then.

Q. 10. Will you describe somewhat more particularly than you have done the character of the injury to the arm?

A. I don't know just how that I can describe it any more than that the soft parts were destroyed; the blood vessels that carry the blood to nourish the forearm were destroyed, and the bones were injured in such a way that in my judgment no more of the arm could have been saved than has been.

Q. 11. About how serious were those external wounds upon the chest to which you have referred in the former answer?

A. The soft parts were simply torn. I wouldn't regard it as a serious wound; it was rather a tedious thing healing up. I wouldn't regard it as serious, endangering life.

Q. 12. About what was the extent of this abrasion of which you have spoken upon the left cheek?

A. Oh, there was a hole, a slight hole, gouged in the cheek about half an inch or ½.

Q. 13. You may state whether or not the scar upon the left cheek is the result of the injury thereto, from which he was suffering at the time you mentioned (referring to scar on left cheek of William Lewis, the boy said to have been injured on this occasion).

A. It is.

Q. 14. Have you now related, as fully as you can remember,
72 the character and extent of the injuries from which William Lewis was suffering at the time you were called to attend him, on November —, 1888?

A. I think I have; yes, sir.

Q. 15. During the time he was in the hospital and under your charge what was his general condition, physically?

A. Well, after one suffering from injuries he had gone through with, I think he was in very good condition.

A. M. CLARK,
By B. O. EDDY,
Official Stenographer, Mahoning County, Ohio.

It is agreed by all parties hereto that the stenographer may write out the foregoing deposition, sign Dr. Clark's name to it as though signed by him, and hereby waive certificate, filing before trial, and all other formalities.

STATE OF OHIO, } *ss:*
Mahoning County, }

I, B. O. Eddy, the official stenographer of Mahoning county, Ohio, do hereby certify that the above-named A. M. Clark was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition to which his name is affixed heretofore, as above set forth, was reduced to writing by me and the stenographic notes taken in the presence of the witness, of which the foregoing is a true copy, and was subscribed by me, as per agreement heretofore stated, and was taken at the time and place in the annexed notice specified.

73 I do further certify that I am not of counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and office this 18th day of May, A. D. 1889.

B. O. EDDY,
Official Stenographer to the Courts of Mahoning County, Ohio.

Cost of taking deposition, three dollars and seven cents ($3.07).

THE STATE OF OHIO, } *ss:*
Mahoning County, }

I, Z. P. Curry, clerk of the court of common plea- of Mahoning county, Ohio, do hereby certify that the foregoing transcript con-

tains due and correct copies of the process issued in said cause, in which Owen Evans, guardian of William Lewis, a minor, is plaintiff and The American Tube and Iron Company is defendant, and also true and correct copies of all pleadings, depositions, and testimony, journal and docket entries, and all other proceedings in said cause.

Witness my hand and the seal of said court at Youngstown, Ohio, this 5th day of October, A. D. 1889.

Z. P. CURRY, *Clerk*,
[SEAL.] By F. E. PROBST, *Deputy Clerk*.

Filed Oct. 8, 1889.

M. W. SANDERS, *Clerk*.

74 And afterwards, to wit, on Monday, February 17th, 1890, an order was entered in this cause, which is in the words and figures following, to wit:

OWEN EVANS, Guard.,
vs.
THE AMERICAN TUBE AND IRON COMPANY. } No. 4730. Law.

This day came the parties, by their counsel, and a jury, being called, came, to wit, W. H. H. Robison, David Murray, Lew Slusser, James Carson, T. H. Arbuckle, John Coventry, T. N. Ganyard, M. Dessenburg, George Schlatterbeck, John Schrink, B. F. Davis, and George H. Cain, who, being duly elected, were duly empanelled and sworn to well and truly try the issues joined between the parties at bar of the court, and thereupon trial of this case proceeded. Plaintiff's testimony-in-chief was closed and testimony on behalf of defendant was begun but not closed, when further proceedings in this case were postponed until to-morrow morning.

And afterwards, to wit, on Tuesday, February 18th, 1890, an order was entered in this cause, which is in the words and figures following, to wit:

OWEN EVANS, Guard.,
vs.
THE AMERICAN TUBE AND IRON COMPANY. } No. 4730. Law.

This day again came the parties, by their counsel, and came also the jury as heretofore duly empanelled and sworn herein, and the trial of this case proceeded. The testimony was closed and arguments of counsel begun but not closed, when further proceedings in this behalf were postponed until to-morrow morning.

75 And afterwards, to wit, on Wednesday, February 19th, 1890, an order was entered in this cause; which order is in the words and figures following, to wit:

OWEN EVANS, Guard.,
vs.
AMERICAN TUBE AND IRON CO. } No. 4730. Law.

This day again came the parties, by their counsel, and came also the jury as heretofore duly empanelled and sworn herein, and the

trial of this case proceeded. The arguments of counsel were concluded, and thereupon further proceedings in this behalf were postponed until to-morrow morning.

And afterwards, to wit, on Thursday, February 20th, an order was entered in this case, which is in the words and figures following, to wit:

OWEN EVANS, Guard.,
vs.
AMERICAN TUBE AND IRON COMPANY. } No. 4730. Law.

This day again came the parties, by their counsel, and came also the jury as heretofore duly empanelled and sworn herein, and thereupon the trial of this case proceeded. The jury, after receiving their instructions from the court, retired for deliberation in charge of a sworn officer of the court.

And after a time said jury came again into court and for verdict say:

"We, the jury in this case, being duly empanelled and sworn, do find for the plaintiff, and we do assess his damages to the sum of ($6,000.00) six thousand dollars.

"DAVID MURRAY, *Foreman.*"

76 And afterwards, to wit, on February 19th, a motion was filed in this cause, which is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

OWEN EVANS, Guardian of WILLIAM LEWIS, Plaintiff,
vs.
THE AMERICAN TUBE AND IRON COMPANY, Defendant. } Motion for a New Trial.

The defendant above named now moves the court to set aside the verdict of the jury rendered in this case and grant to the defendant a new trial thereof for the following reasons:

1. That the court erred on the trial of said cause in excluding evidence of the defendant; to which rulings of the court the defendant at the time excepted.
2. That the court erred in admitting evidence of the plaintiff over the objection of the defendant; to which rulings the defendant at the time excepted.
3. That the court erred in its charge to the jury.
4. That the court erred in refusing to charge as requested by the defendant.
5. That the court erred in its modification of the requests of the defendant.
6. That the verdict is contrary to the evidence.
7. That the verdict is contrary to law.

8. That the verdict is contrary to the weight of the evidence.
77 9. That the damages awarded by the jury are excessive and not in accordance with the evidence.

SANDERSON & NORRIS AND
JOHN A. LADD,
Attorneys for Defendant.

February 20, 1890.

And afterwards, to wit, on Monday, March 31st, 1890, an order was entered in this cause, which is in the words and figures following, to wit:

OWEN EVANS, G'rd.,
vs.
AMERICAN TUBE AND IRON CO. } No. 4730. Law.

In this cause a motion having been filed at this term to set aside the verdict of the jury heretofore rendered herein and for a new trial, and the same remaining undisposed of, it is ordered that the said motion in this case be continued until the next term of this court.

And after-, to wit, on Thursday, May 8th, 1890, an order was entered in this cause, which is in the words and figures following, to wit:

OWEN EVANS, Guardian,
vs.
THE AMERICAN TUBE AND IRON COMPANY. } No. 4730. Law.

This day came the parties, by their counsel, and came on for hearing defendant's motion to set aside the verdict of the jury heretofore rendered herein at the February term, A. D. 1890, of this court, and for a new trial herein, and the same was argued by counsel, and, due consideration having been given by the court,
78 it is ordered that said motion be overruled; to which ruling of the court defendant excepts.

It is thereupon, on motion of the plaintiff, ordered that the said plaintiff, Owen Evans, guardian of William Lewis, a minor, have and recover from the defendant, The American Tube and Iron Company, the sum of six thousand and fifty-four dollars, being the amount of the verdict of the jury heretofore rendered herein at the February term of this court, together with interest to the first day of this term, and that said sum of six thousand and fifty-four dollars bear interest from April 1. It is also considered that the said plaintiff recover from the defendant the costs of this suit, taxed at $—, and that in default of payment execution issue.

And thereupon defendant tendered its bill of exceptions and asked that the same be signed, sealed, and made a part of the record herein; which is accordingly done.

79 And afterwards, to wit, on May 8th, 1890, a bill of exceptions was filed in this cause, which is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Ohio, Eastern Division.

OWEN EVANS, Guardian of William Lewis, a Minor,
vs.
AMERICAN IRON AND TUBE COMPANY.

Bill of Exceptions.

Be it remembered that at the February term, 1890, of the United States circuit court for the northern district of Ohio, eastern division, this cause came on for trial to a jury before Hon. A. J. Ricks, judge holding said court; and the plaintiff, to maintain the issues on his part, called Celia Sims, William Lewis, and others as witnesses, who gave evidence to the jury tending to prove that defendant was operating a tube works at Youngstown, Ohio; that William Lewis was employed in said works at the time stated in the petition; that at the time he entered upon said employment he was eleven years and five months old and unusually small for his age; that his ordinary occupation in said tube works was that of a "door-puller," which was light work and not of a specially dangerous or hazardous nature; that while he was under twelve years of age, and at about the hour of two o'clock a. m., on the 18th day of November, A. D. 1887, he was ordered by defendant's superintendent, who had charge of all defendant's employees, including the said William Lewis, and was authorized to control and direct their work and movements, to leave his usual work and go to a point in said tube works
80 about one hundred feet distant, which point was a very dangerous place and in close proximity to the unprotected and hazardous machinery, and perform certain labor there, which labor consisted in picking up with a small iron hook certain balls which were used in the construction of tubes and throwing them out of the way of the other workmen there engaged; that he had never before been ordered to that place nor had he performed that kind of labor, nor was the same any part of or in any way connected with the performance of his duties as door-puller; that the place to which he was so ordered by the defendant's superintendent was where red-hot tubes, about two inches in diameter and from twenty to thirty feet long, passed and repassed twice every minute, and where there was continuously a loud noise (described by witnesses as "twice as loud as the roar of a running railroad train," and as "resembling the roar of artillery"); that in the performance of the labors so directed by defendant's superintendent to be done he was required to go very near to a set of gearing and bevel cog-wheels which were immediately to the left and rear of where said work was to be performed, and which were about three feet from the floor and

were rapidly revolving at the time, and which were entirely unfenced and unprotected; that while performing said labor in accordance with the directions of said superintendent, and while in the exercise of ordinary care and prudence, his clothes were caught by said cog-wheels and he was dragged into said machinery and had his arm crushed off near the shoulder and was otherwise
81 severely injured; that no warning or caution had been given him respecting the dangers or hazards of said place; that he had not been instructed by anybody as to the manner of doing said work, and that he was not informed and did not know of the dangers of said place; and thereupon plaintiff rested his case.

The defendant called James H. Matheson, Daniel Smeltz, and others as witnesses, who gave evidence to the jury tending to prove that the boy, William Lewis, was a bright boy; that the place where he usually worked was entirely free from danger; that certain of the defendant's employees other than the foreman had driven him away at various times from the vicinity of the place where he was injured; that the foreman had once told him that he must stay at his usual place of work or he would be discharged; that the foreman did not send him to the place where he was injured at the time of his injury; that had he stayed at his usual place of work he would not have been injured; that he was of a mischievious and restless disposition; that just before receiving his injuries he came to the place where he was injured and requested the privilege of doing the work of a man whose business it was to seize with a pair of heavy tongs the red-hot tubes as they came from the furnace and drag them out of the way; that said man, who was an adult employé and servant of the defendant, granted this request and gave him the tongs with which to perform said labor; that while trying to perform said labor he slipped or stumbled and fell into the cog-wheels and gearing above-
82 mentioned and was injured as *as* hereinbefore stated; that he went voluntarily to the place where he was injured; that he was injured because of his own negligence; and thereupon defendant rested his case.

And thereupon the plaintiff, in rebuttal, recalled William Lewis and others, who gave evidence tending to rebut all the evidence of the defendant; and the said William Lewis especially denied that he had at any time previous to the time of the injury been at the place where the injuries occur-ed, or had at any time been ordered or driven away from said place, or had at any time been instructed, warned, or cautioned respecting the dangers of said place, or had gone voluntarily to said place; and also especially denied that he had at any time the tongs mentioned by defendant's witnesses, or was engaged at any time in trying to remove any tubes. And thereupon the plaintiff rested his case, and both plaintiff and defendant rested their cases. And thereupon, before any argument, the defendant, in writing, requested the court to charge the jury as the law applicable to the case each of the following propositions separately:

I.

In this case the burden of the proof rests upon the plaintiff to prove to the jury, by fair preponderance of the evidence, that the defendant was guilty of negligence substantially as charged in the petition, which was the proximate cause of the injuries complained of by the plaintiff,] and unless he does so prove, your verdict should be for the defendant.

83

II.

If you shall find from the evidence that the defendant employed William Lewis when he was under the age of twelve years; that during the time he was retained in the service of defendant and at the time he sustained the injuries complained of he was under the age of twelve years, then the court charges you as matter of law that such employment and such retention in its service on the part of the defendant were not in and of themselves negligence on the part of the defendant.

III.

If the jury shall find from the evidence that the mere employment and retention in its employment by defendant of William Lewis while under the age of twelve years were not one or both the proximate and necessary cause of the injuries of which he complains, but that such injuries were caused by some other acts of either the said William Lewis or the defendant, then the court charges you as matter of law that such employment by and retention in the service of the defendant of said William Lewis is of no importance in the case and need not be further considered by you in determining whether the defendant was guilty of negligence.

IV.

If the jury shall find from the evidence that the employment of William Lewis by the defendant or his subsequent retention in its service did not necessarily lead to and cause the injuries of
84 which he complains, then the court says to you that such employment or such retention in such employment will not entitle the plaintiff to a recovery in this action.

V.

If the jury shall find from the evidence that the defendant employed William Lewis when he was under the age of twelve years and retained him in its service, and that he was injured while under said age, but shall further find that his injuries were caused either by some act of some superintendent or boss of the defendant other than such employment and service, or by some act on his own part, then the court charges you that such employment of said William Lewis, he being under the age of twelve years, nor such retention in the service of the *of the* defendant while under such age,

nor both, affords any grounds for a recovery in this action, and if that be all that you shall find as the negligence charged against the defendant, you- verdict should be for the defendant.

VI.

If the jury shall find from the evidence that William Lewis left the place where he was employed to work of his own accord, and went to the place where he was injured of his own accord, without being ordered, directed, or requested by any one so to do, and that he knew that such place to which he went was dangerous and unsafe, and in consequence he was injured, then he was guilty of contributory negligence and cannot recover in this action, and if the jury so find they should return a verdict for the defendant.

85 VII.

The court says to the jury that the question of whether William Lewis, being of the age he is shown by the evidence in the case to have been at the time he was injured, had at said time the discretion and understanding to be aware of the danger of placing himself in proximity to or contact with the machinery and appliances by which he was injured is a question of fact for the determination of the jury under all the evidence upon that subject and in all of the circumstances of the case, and if the jury shall find from the evidence that William Lewis knew or by the exercise of ordinary care and discretion, which persons of his age and intelligence are accustomed to exercise in the same or similar circumstances, might have known that it was unsafe and dangerous to go to the place where he was injured or place himself in proximity to or in contact with the machinery or appliances by which he was injured, and that he went to such place and so placed himself in danger of his own accord, then the court says to the jury that he was guilty of such contributory negligence as precludes any right of recovery by plaintiff in this action, and your verdict should be for the defendant.

VIII.

The court says to the jury that unless contributory negligence on the part of William Lewis appears from the evidence
86 given in the case on the part of the plaintiff the onus of showing the same rests upon the defendant as matter of defense, and in consideration of the question upon all of the evidence upon the subject in the case the jury should assume that William Lewis at the time he was injured possessed the ordinary intelligence and discretion usually possessed by others of the same or similar age, unless it be clearly shown by the evidence that at said time he did not possess such ordinary intelligence and discretion.

IX.

The court says to the jury, as matter of law, that in the absence of anything to show to the contrary William Lewis must be assumed

to have had at the time he was injured the intelligence and understanding which are usual with boys of his age; that if there is nothing in the evidence to show that he did not know the danger of coming in contact with the machinery by which he was injured it must be assumed that he was well aware of it.

X.

The court says to the jury that it is alleged in the petition that William Lewis at the time he was injured — eleven years and five months old, and if you shall find from the evidence that he was a boy of the usual and ordinary intelligence of boys of that age in general; that he was warned or ordered by other employés not to go to the place where he was injured; that he understood
87 such warning and orders; that he was not ordered, directed, or requested at or about the time he was injured to go to the place where he was injured, but went there of his own accord and was injured, then he was guilty of such contributory negligence as prevents any recovery in this action, and should return a verdict for the defendant.

XI.

If the jury shall find from the evidence that William Lewis possessed the usual intelligence of boys of the age of eleven years and five months old, shall also find that he was injured in consequence of leaving the place where he was employed and stationed to work; that he went of his own accord to or near to the place he was injured, and he was injured in consequence of endeavoring to pull a pipe or some other work that it was not his duty to perform and that he was not requested or ordered to perform, then he was guilty of such negligence as prevents any recovery in this action, and your verdict should be for the defendant.

And thereupon the court refused to charge the above requests, save as found in the following charge, and did charge the jury as follows, to wit:

88 *Charge.*

GENTLEMEN OF THE JURY: This action was instituted by Owen Evans, as guardian of William Lewis, to recover damages for injuries sustained by him while in the employ of the defendant when he was under the age of twelve years. The petition avers that said boy went into the employ of defendant July, 1887, and continued in such employ until November 18, 1887, when he was injured by the negligence of defendant's boss in ordering him to a place of danger to do labor of a hazardous character, near machinery which was not properly protected, and that defendant placed said boy in this dangerous place without properly cautioning him as to the dangers to which he was exposed. These are the main allegations which you will find it necessary to investigate under the issues made.

I may say at the outset that the case is to be tried upon the testimony as presented before you, and neither sympathy for the plaintiff's ward on the one hand nor prejudice against the defendant corporation on the other are to enter into your deliberations.

There is nothing in the testimony to show or to warrant you in concluding that this defendant employed this boy for any censurable purpose. It is not here arraigned as a criminal under this statute for the employment of this boy; but, so far as there
89 is affirmative evidence before you, it appears that the mill boss employed the boy out of sympathy for him and his mother, and that it therefore stands here entitled to the presumption of having employed him without any unworthy or criminal intent. Now, imbued with this spirit of perfect fair dealing between these parties, let us proceed to consider this testimony as to the legal principles that are to control you in finding your verdict.

The statute of Ohio prohibits all persons from employing boys under twelve years of age in such establishments as the defendant operates.

How does this statute affect this case? If defendant was being prosecuted under the Ohio laws for violation of this statute, the fact of employment by defendant and the fact that it knew him to be under twelve years of age at the time of such employment would be all that would be needed to secure conviction; but, in a civil action for an injury to such minor on account of such employment, other considerations may enter into the case before the defendant would be liable for such illegal employment. In a civil case where the illegal employment was the direct and proximate cause of the injury the defendant would be liable; but where, in such an action, injuries are complained of which go beyond the employment and involve questions of negligence on the part of the defendant or contributory negligence on the part of the plaintiff, then the mere employment or violation of this statute is not in and of itself
90 enough to entitle plaintiff to recover. With this instruction as to the effect of this statute, you may then proceed to inquire as to the next question: Has the defendant been guilty of negligence other than the mere employment which resulted in this accident?

If you find that the defendant gave this boy employment and furnished him a safe and easy task in an unexposed position, and that if he had attended to his duties and labor and remained at his post he would have escaped this injury, such employment cannot be claimed to be negligence or the proximate cause of this injury.

If you find from the evidence that the defendant furnished this boy with a safe employment, suitable to his condition, at a safe distance, but that of his own choice he undertook to go about the mill and its machinery, and so voluntarily or without direction exposed himself to dangerous machinery, or undertook of his own will to do dangerous work, and that he was of such age and experience and had knowledge of the machinery as to enable him to know of such dangers, and that in so doing he exposed himself to risks that a prudent, bright, and careful boy of his age, exercising

ordinary and reasonable care, ought not to have done, and was thereby injured, then I say to you as a matter of law that he contributed to that injury and cannot recover. A boy of his age and experience cannot be, and ought not to be, held to the same degree of care that ought to be expected of a man of years and knowledge.

91 But you have seen the boy and have heard him testify; you have heard evidence as to his bright and popular ways and his habits, and from these observations and evidence you can safely judge as to his intelligence and knowledge of this mill and its machinery in November, 1887, and as to his information as to the process of making tubes, and you must judge therefrom as to what would have been ordinary care and prudence, or what would have been negligence on his part at that time in his life. He had been in the service of the defendant some months; he knew the employés and the general nature of their respective employments; he had seen the machinery operate and knew, or had opportunities to see, its dangerous and hazardous points. You will probably consider all these facts when you come to apply the proper standard of care and prudence for such a boy under the circumstances of this case. If in applying this standard you find that he acted without proper care and caution in voluntarily undertaking any part of the work about the mill, and through this want of care he voluntarily exposed himself to dangers about which he ought to have known, then he cannot recover in this case.

If you find that William Lewis was under twelve years of age at the time he received the injuries complained of; that he was at that time incapable, by reason of his youth, inexperience, and want of knowledge, of apprehending and appreciating the dangers and hazards of dangerous machinery, then I say to you that he would not be in law a coservant or fellow-laborer of the adult servants of defendant there employed.

92 If William Lewis, being there under such employment as described, was ordered or knowingly permitted by one of defendant's adult servants then and there engaged in dangerous and hazardous work to assume such dangerous work at or near dangerous machinery and in a dangerous and hazardous place, the dangers and hazards of which Lewis was incapable of appreciating, and that while so employed in performing the work of such adult servant received the injuries complained of, it is a question for you to determine whether or not, under all the circumstances, such conduct of such adult male servant of defendant was negligence; and if you find that such adult servant was negligent, and that the injuries to this boy were the direct and proximate result of such negligence, then I say to you, as a matter of law, that the negligence of such adult servant would be the negligence of defendant, for which it would be liable, and for which the plaintiff would be entitled to recover, unless you find that said Lewis did not, in and about the performance of such service, exercise such care and prudence as boys of his age, experience, and intelligence are accustomed to exercise under the same or similar circumstances,

and that his failure to exercise such care and prudence contributed to his injuries.

The plaintiff's ward was not a colaborer to the other employés in the legal sense that he stood on the footing of owing the same duties the one to the other. He did not occupy, as to them, the same relation as though he had been a man or a minor of more mature years; but he was not there as an infant and a ward,
93 to be looked after by such employés whenever he might leave his post of duty to which he had been assigned. If he left that place of duty and took other risks, he took and carried with him wherever he voluntarily went about that mill a duty to look after himself and protect himself from dangers to the extent of that care and prudence which you might reasonably expect of a boy of that age, as I have before explained, and the other employés in the mill owed to him no other or greater care of oversight than they would be expected to extend to a prudent and careful boy of that age and experience.

This takes us to the next point in the case. If you find, gentlemen, that although the defendant employed this boy to perform labor, not dangerous, to be performed at an unexposed place, but during such employment, by its mill boss or superior officer, directed the boy to go to a place where he was not accustomed to be and to do labor he had not been accustomed to do and at a dangerous point, against which he had not been properly warned and cautioned, and you further find that the boy, under such orders, did go and undertake to perform that labor with as much care and prudence as would be expected of a prudent and cautious boy of that age and experience under similar circumstances, and while in that place and while undertaking to do that work he was injured, then the defendant would be liable for such injury, and your verdict should be for the plaintiff.

It was the duty of the defendant to anticipate that minors
94 would not exercise the same care and foresight amid dangers that adults would, and it was the duty of the defendant through its proper subordinates to give such minors, when taken in its employment, proper instructions as to their duties and proper caution as to the dangers of their employment and of the machinery surrounding them; but if you find from the evidence that plaintiff's ward had been in the employ of the defendant for a sufficient length of time to make him fully aware of the dangers of his work and of the place, or to have enabled a boy of his age and experience, by reasonable care and diligence, to have made himself aware of such dangers, and that he had such knowledge, or should have had it, then the failure of the defendant to have originally cautioned and warned him, if you find that it did not do so, is not negligence that approximately and directly caused this injury.

These are the principles of law, gentlemen, that are to guide you in your deliberations in this case. The duty of defining the law is with the court, and you are bound by such defination and instruction, and you will accept them without any discussion or consideration, whether they are right or wrong, in your judgment.

The duty of deciding the *the* facts is with you. But there are some well-settled general principles of law that govern you in passing upon these facts, and it is proper in this case that I should direct you- attention to them.

There is a marked conflict of testimony as to the facts upon which you are to pass. Your own experience has doubtless already
95 made it plain that good and honest men will often differ as to the details of facts about which they testify. This is especially true when an injury occurs in a noisy mill and, under the circumstances of this case, after over two years of time. This injury occur-ed in a mill where none but the employés of the defendant saw how it happened. The men to whom we must therefore look for the facts were the employés; some of them are still in the employ of the defendant, and some are not. You are to presume that all these men are honest and truthful and have told the truth as they believe it, unless the contrary appears. It will not do to as-ume that all these men have disregarded their oaths and are unworthy of belief simply because they are in the employment of defendant. It would be a most alarming and dangerous situation if the relation of employé and employer in this enlightened and free country should put such men under suspicion and disability. But you will fairly and properly consider whether as to any of these witnesses this relation has in any way embarrassed them or restrained them from telling freely all the facts within their knowledge as to this accident. This you can properly judge from their conduct on the stand, for there has been nothing in the way of impeachment by direct attac*t* upon their character. Did they manifest any disposition to suppress any of the facts, or were they reluctant to tell the whole truth as they knew it? Did they show feeling, antipathy toward the plaintiff, or any conduct that impressed you as throwing suspicion upon their truth-
96 fulness? If so, you will properly weigh*t* their evidence as being impaired to that extent. But the mere fact that they disagree as to details and as to which way or route of travel the boy got to this place of accident, or in just what way he got caught into this gearing should not of itself lead you to set aside their testimony and disbelieve them *in toto*. It is, on the contrary, your duty to assume that they want to tell the truth (if nothing in their conduct leads you to think otherwise) and to reconcile their statements, if possible. Look to see if they have any interest in this case which is likely to swerve their testimony—and this is true of the plaintiff's as well as of the defendant's witnesses—and if you find such interest exist, it is a circumstance to which you can look in weighing their testimony. Witnesses may differ in details, and yet their testimony as to the important facts may agree. Thus several witnesses may agree that this boy at the time of the injury was at a certain place at a certain time, and yet may disagree as to the route he traveled to get there, or why he went there, or what he did while he was on his way there. The difference as to the unimportant details you may pass over as matters about which witnesses may be honestly mistaken; but that would not warrant you in dis-

regarding their evidence as to the essential and main fact to which they agree and are corroborated. So you will treat the discrepencies between the witnesses as to where Smeltz stood when it is
97 claim- he ordered this boy to the place where the accident happened. The important fact in this connection is, Was such order or direction given? and it is not important in settling that fact where he stood when he gave it. Where he stood at this time may be important as relating to other disputed facts, and, if so, you may consider it in that relation as material. I refer to these general principles as indicating how you may intelligently consider all this testimony, reconcile so much of it as you can, and gather from all of it the important facts that must guide you in reaching a verdict.

The plaintiff must satisfy you by a fair preponderance of the evidence that the acts of negligence relied upon were committed by the defendant. There must be a fair preponderance of such evidence; not such as to remove all reasonable doubt, but such as to satisfy you that the fair weight of it is with the plaintiff; and unless the fact of contributory negligence appears from plaintiff's testimony, the defendant must satisfy you of that by the same preponderance. But in this connection you should assume that William Lewis at the time he was injured possessed the ordinary intelligence and discretion possessed by other- of the same age, unless the contrary appears.

If under these instructions you find that the plaintiff is entitled to recover, it will be your next duty to award him damages. The court can give you no exact rule by which you can measure
98 these damages. All it can do in that particular is to give you such elements as you may take into consideration in making up your verdict. The compensation to which the plaintiff is entitled, if entitled to recover at all, is measured by the nature of the injury. In estimating the compensation due the plaintiff you should take into consideration his bodily suffering and pain, including the pain and suffering at the time of the accident, while recovering or partially recovering from his injuries; what he has suffered since; what he will suffer, if any, by reason of the accident in the future. You may also take into consideration the disfigurement of his face and the loss of his arm. You should also consider whether or not the injuries to his body are permanent and whether or not they are of such a character as to decrease his earning capacity in such work or vocation as he would probably be fitted to pursue. If you find that the injuries and mutilations of his chest are of such a nature as to interfere with and decrease his earning capacity, then you should estimate for those injuries an amount sufficient to make him whole in that respect. You should also consider the loss of plaintiff's arm; the effect, if any, such loss will have upon his capacity to earn money in such pursuit or vocation as he will probably be fitted to fill, and if you find that the loss of the arm will interfere with and decrease plaintiff's earning capacity in such pursuit or vocation, then you should allow for such loss of earning capacity a sum sufficient to compensate him for such loss. You may also,

99 in estimating the amount of compensation due plaintiff take into consideration the mental suffering, if any, naturally resulting from the injuries received.

This is a case, gentlemen, naturally appealing to our sympathies, and I therefore feel it proper and prudent to remind you that the rights of parties in courts of justice are to be determined upon well-defined principles of law and not upon the impulses of generous hearts, however well prompted. I need not, I am sure, say more to insure to both these parties a full, fair consideration of their rights, and to receive from you a just verdict according to the law and the evidence.

Take the case, gentlemen, and make such finding as your consciences approve.

100 Thereupon the defendant, by its counsel, then and there excepted to the refusal of the court to charge propositions No. one and No. two and No. three and No. four and No. five and No. six and No. seven and No. eight and No. nine and No. ten and No. eleven and each one thereof, and defendant also excepted to the following portions of the charge of court to the jury, to wit:

"If you find that William Lewis was under twelve years of age at the time he received the injuries complained of, and that he was at that time incapable by reason of his youth, inexperience, and want of knowledge of apprehending and appreciating the dangers and hazards of dangerous machinery, then I say to you that he would not be in law a coservant or fellow-laborer of the adult serv-nts of the defendant there employed."

The defendant also *accepted* to the following portion of said charge, to wit:

"If William Lewis, being then under such employment as described, was ordered or knowingly permitted by one of defendant's adult servants then and there engaged in dangerous and hazardous work to assume such dangerous work at or near dangerous machinery and in a dangerous and hazardous place, the dangers and hazards of which Lewis was incapable of appreciating, and that while so employed in performing the work of such adult servant — received the injuries complained of, it is a question for you to determine whether or not under all the circumstances such
101 conduct of such adult male servant of defendant was negligence; and if you find that such adult servant was negligent, and that the injuries of this boy were the direct and proximate result of such negligence, then I say to you, as a matter of law, that the negligence of such adult servant would be the negligence of the defendant, for which it would be liable and for which plaintiff would be entitled to recovery."

Defendant also excepted to the following in said charge:

"The plaintiff's ward was not a colaborer to the other employés in the legal sense that he stood on the footing of owing the same duties the one to the other. He did not occupy as to them the same relation as though he had been a man or minor of more mature years."

Defendant also excepted to the following in said charge, viz:

"You may also, in estimating the amount of compensation due plaintiff, take into consideration the mental suffering, if any, naturally resulting from the injuries received."

The jury having returned a verdict in favor of plaintiff, the defendant immediately filed a motion for a new trial for reasons in said motion, and by the request of the trial judge the circuit judge joined in the hearing of the motion to set aside the verdict and for a new trial; which, on consideration of the same, the court overruled said motion; to which the defendant excepted and excepted to the judgment rendered on said verdict.

And now, within the time allowed by law and rule of court,
102 the defendant presents to the court this its bill of exceptions, any prays that the same be allowed, signed, and sealed by the judge holding said court and ordered to be made a part of the record in this case; and, the court having examined the same and finding it true, it is accordingly so done and ordered this 8th day of M. y, A. D. 1890.

AUGUSTUS J. RICKS,
U. S. Dist. Judge, N. D. O.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Owen Evans, guardian of William Lewis, a minor, as plaintiff, and The American Tube and Iron Company, as defendant, a manifest error hath happened, to the great damage of the said The American Tube and Iron Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller,
Seal of the Circuit Court, Northern Dist. of Ohio. Chief Justice of the said Supreme Court, the 8th day of July, in the year of our Lord one thousand eight hundred and ninety.

MARTIN W. SANDERS,
Clerk of the Circuit Court of the United States, Northern District of Ohio.

Allowed by—
——.

104 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Eastern Division, }

In obedience to the command of the within writ of error, I have made diligent search of the records and files in the case therein entitled in said court, and do now herewith return with said writ a full, true, and complete copy of the record and proceedings in the said suit

MARTIN W. SANDERS, *Clerk.*

104½ And afterwards, to wit, on the 8th day of July, A. D. 1890, a bond was filed in said cause; which bond is in the words and figures following, to wit:

Know all men by these presents that we, American Tube and Iron Company, Thos. W. Sanderson, and C. H. Andrews, are held and firmly bound unto Owen Evans, guardian of William Lewis, a minor, in the full and just sum of thirteen thousand dollars, to be paid to the said Owen Evans, guardian as aforesaid, his certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the February term, 1890, of the circuit court of the United States for the northern district of Ohio, E. D., in a suit depending in said court between Owen Evans, guardian of William Lewis, a minor, plaintiff, and American Tube and Iron Company, defendant, a judgment was rendered against the said American Tube and Iron Company, and the said American Tube and Iron Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Owen Evans, guardian as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that
104¾ if the said American Tube and Iron Company shall prosecute said cause to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE AMERICAN TUBE AND
IRON CO., [SEAL.]
By W. L. KAUFFMAN, *Ch'f Cl'k.*
THOS. W. SANDERSON.
C. H. ANDREWS.

Approved by—
AUGUSTUS J. RICKS,
U. S. Dist. Judge.

105 The United States of America to Owen Evans, guardian of William Lewis, a minor, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, wherein The American Tube and Iron Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Augustus J. Ricks, judge of the district court of the United States and one of the judges of circuit court, this 8th day of July, in the year of our Lord one thousand eight hundred and ninety.

AUGUSTUS J. RICKS,
U. S. Dist. Judge.

105½ On this 8th day of July, in the year of our Lord one thousand eight hundred and ninety, personally appeared Thomas W. Sanders before me, the subscriber, M. W. Sanders, U. S. commissioner, northern district Ohio, and makes oath that he delivered a true copy of the within citation to L. W. King, one of the attorneys of record of the defendant in error herein.

THOS. W. SANDERSON.

Sworn to and subscribed before me this 8th day of July, A. D. 1890.

MARTIN W. SANDERS,
U. S. Com'r, N. D. O.

106 UNITED STATES OF AMERICA, }
Northern District of Ohio. }

I, Martin W. Sanders, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Owen Evans, guardian of William Lewis, a minor, is plaintiff and The American Tube and Iron Company is defendant, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, on this 18th day of July, A. D. 1890, and of the Independence of the United States of America the 115th year.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

MARTIN W. SANDERS, *Clerk.*

107 THE UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States to the judges of the circuit court of the United States for the northern district of Ohio, Greeting:

Whereas in a certain suit in said circuit court between Owen Evans, guardian of William Lewis, a minor, plaintiff, and The American Tube and Iron Company, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested:

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of November, A. D. 1892.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

108 THE STATE OF OHIO, } *ss:*
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, }
vs. } No. 15190.
AMERICAN TUBE & IRON COMPANY. }

Pleas before the Honorable George F. Robinson, the presiding judge of the court of common pleas of the second subdivision of the ninth judicial district of Ohio, composed of the counties of Mahoning, Trumbull, and Portage, holding a term of said court within and for the county of Mahoning, begun May 2nd, 1892.

Be it remembered that Owen Evans, guardian of William Lewis, a minor, on the 19th day of May, 1892, filed his motion in a certain action therein pending, wherein Owen Evans, guardian of William Lewis, a minor, was plaintiff and American Tube and Iron Company was defendant; which motion is in the words and figures following, to wit:

THE STATE OF OHIO, } ss:
Mahoning County, }

In the Court of Common Pleas.

OWEN EVANS, Guardian of William Lewis, a Minor,
vs.
AMERICAN TUBE & IRON COMPANY. } Motion. No. 15190.

The plaintiff, Owen Evans, guardian of William Lewis, now comes and moves the court to modify its judgment and findings in this case, as entered on its Journal Number 38, page 60, in the following particulars, to wit, so that the same may read as follows: "That the said defendant is a citizen and resident of the State of Pennsylvania," and, for ground therefore, says that on the 109 16th day of September, 1889, the defendant filed its petition for removal of said case to the circuit court of the United States, and said petition came on for hearing on the 3rd day of October, 1889; that said petition for removal averred "that the said defendant was and is a citizen of the State of Pennsylvania, and was and is a corporation incorporated and doing business under and by virtue of the laws of the State of Pennsylvania," and that the court found that the said American Tube & Iron Company was at said time a citizen and resident of the State of Pennsylvania; yet, notwithstanding the said finding, by the mistake, neglect, and omission of the clerk, the same was entered on the journal of said court as a finding by the court that the defendant, The American Tube & Iron Company, was a citizen and resident of the State of Ohio.

The plaintiff herein asked the court to vacate and modify so much of the judgment and finding in said case, as appears by said journal, by causing the word "Ohio," following the words "said defendant is a citizen and resident of the State of," to be stricken out, and instead thereof the word "Pennsylvania" inserted.

R. B. MURRAY,
KING & McVEY,
A. J. WOLF,
Plaintiff's Attorneys.

MAY 17, 1892.

We hereby acknowledge notice of the foregoing motion by copy thereof.

THE AMERICAN TUBE & IRON COMPANY,
By —— ——, *Its Attorney.*

110 THE STATE OF OHIO, } ss:
Mahoning County, }

OWEN EVANS, Guardian of William Lewis, }
vs. } Affidavit.
THE AMERICAN TUBE AND IRON COMPANY. }

Before me, the undersigned authority, personally appeared U. F. Kistler, who, being duly sworn, says that on May 23rd, 1892, he served upon T. W. Sanderson, attorney for the defendant company, a true copy of a motion filed in this court in this case to correct the journal entry as found in the journal of this court, vol. 38, page 60. Further affiant saith not.

U. F. KISTLER.

Sworn to before me by the said U. F. Kistler and by him subscribed in my presence this 23rd day of May, 1892.

[SEAL.] R. B. MURRAY,
Notary Public.

And be it further remembered that on the 9th day of July, 1892, said motion coming on for hearing before his honor George F. Robinson, the presiding judge of said court, who made the following findings and orders, to wit:

"This cause came on for hearing upon the motion of the plaintiff to correct a journal entry in this case found in Journal 28, page 60, so that the same may read 'that said defendant is a citizen and resident of the State of Pennsylvania,' and the court finds that due and proper notice of the filing of the motion has been made upon the defendant in the case, and, being present by its counsel of record, the court, upon hearing the same and the arguments of
111 counsel, finds that the matters set forth in this motion are true, and that the said motion is well taken. It is therefore ordered that the journal entry in said case found in Journal 38, page 60, be corrected by erasing therefrom the word 'Ohio' and inserting therein the word 'Pennsylvania,' so that the same shall read, after the words 'which bond is hereby approved': 'And thereupon the court finds that said defendant is a citizen and resident of the State of Pennsylvania, and that the plaintiff is a citizen and resident of the State of Ohio, and that defendant is entitled to such removal;' and in all other respects, except the changing of the word 'Ohio' to the word 'Pennsylvania,' said journal entry be and remain as recorded in Journal 38, page 60; to all which defendant excepts upon the ground that the court has no jurisdiction in the premises or over said cause or any entry or part of the record thereof."

Certificate.

THE STATE OF OHIO, } ss:
Mahoning County, }

I, Z. P. Curry, clerk of the court of common pleas of Mahoning county, Ohio, do hereby certify that the foregoing transcript con-

tains due and correct copies of all process, pleadings, motions, and orders and proceedings and journal entries had in the case of Owen Evans, guardian of William Lewis, plaintiff, *vs.* American Tube & Iron Company, defendant, in the court of common pleas of said county, since the order for removal heretofore made in this case.

Witness my signature as such clerk and the seal of said court, at Youngstown, this 26th day of October, A. D. 1892.

[SEAL.] Z. P. CURRY, *Clerk.*

112 THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss:

OWEN EVANS, Guardian of William Lewis,
vs.
AMERICAN TUBE & IRON COMPANY.

I, Irvin Belford, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be a true copy of the supplementary transcript of record in the above-entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Seal of the Circuit Court, Northern Dist. of Ohio.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 30th day of November, A. D. 1892, and in the 117th year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*
R. K. BEACH, *Deputy Clerk.*

113 [Endorsed:] 4730. William Lewis, guardian, *vs.* American Tube & Iron Company. Copy of supplementary transcript of record from Mahoning common pleas court. Filed in the U. S. circuit court, northern district of Ohio, eastern division. Irvin Belford, cl'k. R. B. Murray.

114 [Endorsed:] Case No. 14,096. Supreme Court U. S., October term, 1892. Term No., 388. The American Tube & Iron Co., pl'ff in error, *vs.* Owen Evans, guardian, &c. Writ of certiorari & return. Filed Dec. 2d, 1892.

Endorsed on cover: Case No. 14,096. N. Ohio C. C. U. S. No. 146. The American Tube and Iron Company, plaintiff in error, *vs.* Owen Evans, guardian of William Lewis, a minor. Filed August 6, 1890.

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Office Supreme Court U. S.
FILED.
NOV 9 1892
JAMES H. McKENNEY,
CLERK.

No. .....

In the Supreme Court of the United States

THE AMERICAN TUBE AND IRON COMPANY,

Plaintiff in Error,

vs.

OWEN EVANS, GUARDIAN OF WILLIAM LEWIS,

Defendant in Error.

RECORD ON MOTION FOR CERTIORARI MADE BY DEFENDANT IN ERROR.

T. W. SANDERSON,
Attorney for Plaintiff in Error.

R. B. MURRAY,
L. W. KING and
A. J. WOOLF,
Attorneys for Defendant in Error.

ARENS & KERR, PRINTERS.

THE UNITED STATES OF AMERICA.

In the Supreme Court.

THE AMERICAN TUBE AND IRON COMPANY,
vs.
OWEN EVANS, GUARDIAN OF WILLIAM LEWIS.

MOTION.

To the Honorable Judges of the Supreme Court:

The defendant in error, Owen Evans, guardian of William Lewis, now comes and humbly represents to the Court that on 12th day of June, 1888, he filed in the Court of Common Pleas of Mahoning county, Ohio, his petition against the said plaintiff in error, The American Tube and Iron Company, and caused summons to issue thereon, and be duly served upon the plaintiff in error, The American Tube and Iron Company. That on the 7th day of September, 1888, the defendant duly answered in said State Court; and on May 17th, 1889, the plaintiff in said State Court filed his reply thereto. That on the 16th day of May, 1889,

the plaintiff in error herein filed its petition and bond for removal of said cause to the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

That on May 25th, 1889, the plaintiff in the said State Court filed his amended petition, and on August 19th, 1889, the plaintiff herein being defendant in the State Court, answered to said amended petition. And on September 16th, 1889, the plaintiff filed its petition, affidavit and bond for removal of said cause to said Circuit Court of the United States, alleging as grounds therefor that the plaintiff in the State Court at the time when said suit was brought, and at the time his petition was filed, was a citizen and resident of the State of Ohio; and that the defendant, The American Tube and Iron Company, was at said times a citizen of the State of Pennsylvania, and was a corporation, duly incorporated and organized, and doing business under and by virtue of the laws of the State of Pennsylvania. And also alleged other grounds, as provided in the act approved March 3, 1887, entitled "An Act Entitled to Amend an Act of Congress, Approved March 3, 1875, Entitled an Act to Determine the Jurisdictions of the Circiut Courts, and to Regulate the Removal of Causesf rom State Courts, and for Other Purposes"

On September 25th the plaintiff in said State Court filed his motion to strike from the files of said State Court the said petition, affidavit and bond for removal.

The said matter came on for hearing the third day of October in said State Court, and such pro-

ceedings were had that there was entered in Journal 38, page 60, of said State Court, a Journal Entry and Order in the following words, to-wit:

"OWEN EVANS, GUARDIAN OF WILLIAM LEWIS,
vs.
THE AMERICAN TUBE AND IRON COMPANY.

"This cause came on for hearing on the motion to the petition for removal of this cause to the Circuit Court of the United States, which motion being heard and understood by the Court, the same is overruled.

"Thereupon the defendant, The American Tube and Iron Company, having filed on September 16th, 1889, its petition for the removal of this cause to the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, and having filed on the 20th day of September, 1889, a bond with good and sufficient sureties, pursuant to the Statute, which bond is hereby approved. Thereupon the Court, finding that the said *defendant* is a citizen and resident of the State of *Ohio*, and that the *plaintiff* is a citizen and resident of the State of *Ohio*, that defendant is entitled to such removal, do hereby accept said petition and bond, and order that such cause be removed for trial into the next Circuit Court of the United States for the Northern District of Ohio, Eastern Division, pursuant to the Statutes of the United States, and all further proceedings in this Court in said case are hereby stayed, unless said

case be remanded to this Court for trial and determination herein." To all of which said plaintiff excepts.

The defendant herein says that no other or further proceedings were had in said case in said State Court at said time, and said case was removed to said Circuit Court, as prayed for, and the same was tried therein, and the proceedings thereof are as appear in the Record filed herein by the plaintiff in error, to which the defendant in error herein prays to be allowed to refer for the proceedings then and there had in said case.

The defendant in error herein says that the Clerk of said State Court, in entering the said order and findings above stated, did not enter the same truly, as actually found and determined by the Court, but by mistake entered the finding "*That the said defendant is a citizen and resident of the State of Ohio;*" when it was the finding of the Court, "*That the said defendant is a citizen and resident of the State of Pennsylvania.*" And the said Clerk should have so entered the same, but by mistake, neglect and omission he entered the same as hereinbefore set forth.

The defendant in error herein says that the said mistake of the Clerk never became known to him or his attorneys until about the 28th day of April, 1892.

That the Record in this case has not been printed and neither the defendant in error or any of his attorneys has ever seen the Record as filed in this Court. And the defendant in error had no money or means to procure a transcript thereof,

and that his ward is young and inexperienced, being about eleven years of age when he lost his arm by reason of the negligence charged in this case.

That on the 19th day of May, 1892, the defendant in error, by his attorneys, filed in the Court of Common Pleas of Mahoning County, Ohio, his motion to correct the said mistake of the Court, and the same was heard and determined on the 9th day of July, 1892, an order was made in said case as provided by the Statute in such cases to correct the said mistake, a true and certified copy of which proceedings and order is hereto attached.

The defendant in error further says that he has caused to be certified to the Circuit Court in which this case was tried all porceeding and the order of the Court, as shown in the certified copy of the Record hereto attached.

The defendant in error therefore moves the Court that a certiorari for diminution of the Record be awarded in this case to the Clerk of the Circuit Court of the United States for a more complete Record, or that this Court allow the Record of this Court to be amended and supplemented by the facts which appear by the certified copy of the Record of the Court of Common Pleas of Mahoning County, Ohio, as hereto attached, and for such other and further orders and relief as may be just and proper in the premises to the effect of doing justice to the parties herein.

By ROBERT B. MURRAY,
L. W. KING, AND
A. J. WOOLF,
Att'ys for Owen Evans, Guardian of William Lewis.

THE STATE OF OHIO, }
Mahoning County, ss. }

Before me, the undersigned authority, personally appeared Owen Evans, guardian of William Lewis, who being duly sworn, says that the matters hereinbefore stated are true.

OWEN EVANS.

Sworn to before me by the said Owen Evans, and by him subscribed in my presence this 27th day of October, A. D., 1892.

J. J. HAMILTON,
[SEAL] Notary Public.

THE STATE OF OHIO, } In the Court of Common
Mahoning County, ss. } Pleas.

OWEN EVANS, GUARDIAN OF WILLIAM LEWIS,
vs. No. 15190.
THE AMERICAN TUBE AND IRON COMPANY.

Pleas, before the Honorable George F. Robinson, the presiding Judge of the Court of Common Pleas of the second subdivision of the Ninth Judicial District of Ohio, composed of the counties of Trumbull, Mahoning and Portage, holding a term of said Court within and for the County of Mahoning, begun May 2, 1892, be it remembered that Owen Evans, guardian of William Lewis, a minor, on the 19th day of May, 1892, filed his motion in a certain action therein pending, where-

in Owen Evans, guardian of William Lewis, a minor, was plaintiff, and The American Tube and Iron Company was defendant, which motion is in the words and figures following, to-wit:

"THE STATE OF OHIO, } In the Court of Common
Mahoning County, ss. } Pleas.

"OWEN EVANS, GUARDIAN OF WILLIAM LEWIS, A MINOR.
vs.
THE AMERICAN TUBE AND IRON COMPANY. } MOTION.
No. 15190.

"The plaintiff, Owen Evans, guardian of William Lewis, now comes and moves the Court to modify its judgment and finding in this case as entered on its Journal number 38, page 60, in the following particulars, to-wit, so that same may read as follows: 'That the said defendant is a citizen and resident of the State of Pennsylvania,' and for grounds therefor, says: That on the 16th day of September, 1889, the defendant filed its petition for removal of said case to the Circuit Court of the United States, and said petition came on for hearing on the 3d day of October, 1889. That said petition for removal averred 'that the said defendant was and is a citizen of the State of Pennsylvania, and was and is a corporation, incorporated and doing business under and by virtue of the laws of the State of Pennsylvania.' And that the Court found that the said The American Tube and Iron Company was at said time a citizen

and resident of the State of Pennsylvania. Yet, notwithstanding the said finding, by the mistake, neglect, and omission of the Clerk, the same was entered on the Journal of said Court as a finding by the Court; that the defendant, The American Tube and Iron Company, was a citizen and resident of the State of Ohio.

"The plaintiff herein asks the Court to vacate and modify so much of the judgment and finding in said case as appears by said Journal, by causing the word "Ohio" following the words, "said defendant is a citizen and resident of the State of," to be stricken out, and instead thereof, the word "Pennsylvania" inserted.

"R. B. MURRAY,
"KING & McVEY,
"A. J. WOOLF.
"Plaintiff's Attorneys."

THE STATE OF OHIO, }
Mahoning County, ss. }

OWEN EVANS, GUARDIAN OF WILLIAM LEWIS,
vs.
THE AMERICAN TUBE AND IRON COMPANY.

AFFIDAVIT.

"Before me, the undersigned authority, personally appeared U. F. Kistler, who being duly sworn, says, that on May 23d, 1892, he served upon T. W. Sanderson, attorney for defendant

company, a true copy of the motion filed in this Court, in this case, to correct the Journal Entry as found in the Journal of this Court, vol. 38, page 60. Further affiant saith not.

"U. F. KISTLER.

"Sworn to before me by the said U. F. Kistler, and by him subscribed in my presence this 23d day of May, 1892. "R. B. MURRAY,

[SEAL] "Notary Public."

And be it further remembered, that on the 9th day of July, 1892, said motion coming on for hearing before His Honor, George F. Robinson, the presiding Judge of said Court, who made the following findings and orders, to-wit:

"This cause came on for hearing upon the motion of the plaintiff to correct a Journal Entry in this case found in Journal 38, page 60, so that the same may read "that said defendant is a citizen and resident of the State of Pennsylvania," and the Court finds that due and proper notice of the filing of the motion has been made upon the defendant in the case, and being present by its counsel of record, the Court, upon hearing the same, and the arguments of counsel, finds that the matters set forth in the motion are true, and that the said motion is well taken. It is therefore ordered that the Journal Entry in said case, as found in Journal 38, page 60, be corrected, by erasing therefrom the word 'Ohio,' and inserting therein the word 'Pennsylvania,' so that the same shall read after the words, 'Which bond is hereby approved, and thereupon the Court finds that said

defendant is a citizen and resident of the State of Pennsylvania, and that the plaintiff is a citizen and resident of the State of Ohio, and that defendant is entitled to such removal." And in all other respects except the changing of the word 'Ohio' to the word 'Pennsylvania,' said Journal Entry be and remain as recorded in Journal 38, page 60. To all which defendant excepts, upon the ground that the Court has no jurisdiction in the premises or over said cause or any entry or part of the Record thereof."

THE STATE OF OHIO, }
Mahoning County, ss. } CERTIFICATE.

I, Z. P. Curry, Clerk of the Court of Common Pleas of Mahoning County, Ohio, do hereby certify that the foregoing transcript contains due and correct copies of all process, pleadings, motions, and orders, and proceedings and journal entries had in the case of Owen Evans, guardian of William Lewis, plaintiff, vs. The American Tube and Iron Company, defendant, in the Court of Common Pleas of said county since the order of removal heretofore made in this case.

Witness my signature as such Clerk, and the seal of said Court at Youngstown, this 26th day of October, A. D., 1892.

Z. P. CURRY,
[SEAL] *Clerk.*

I have been duly served with a copy of the foregoing and consent that the motion may be

heard by the Court at any time upon five days' notice to me.

THOS. W. SANDERSON,
Attorney for Plaintiff in Error.

October 28th, 1892.

THE UNITED STATES OF AMERICA—IN THE SUPREME COURT.

THE AMERICAN TUBE AND IRON COMPANY,
vs.
OWEN EVANS, GUARDIAN OF WILLIAM LEWIS.

AFFIDAVIT.

Before Jonathan J. Hamilton, a Notary Public in and for the County of Mahoning, and State of Ohio, personally came Louis W. King and A. J. Woolf, who being duly sworn, depose as follows: That they are the attorneys of record of Owen Evans, guardian of William Lewis, vs. The American Tube and Iron Company, being the same case which was tried in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, and therein numbered 4730, and is the same case taken on error from said Circuit Court to the said Supreme Court of the United States, wherein The American Tube and Iron Company is plaintiff in error, and Owen Evans, guardian of William Lewis, is defendant in error.

Each deposes that he was not aware of the mistake which had been made by the neglect and

omission of the Clerk of the Court of Common Pleas of Mahoning County, Ohio, in the Journal Entry thereof, under which said case was removed to the Circuit Court of the United States, until about the 28th day of April, A. D., 1892; and that they proceeded with all due dispatch to have the same corrected, so as to state the true finding and order of the Court. And that each and all the facts set forth in the motion and sworn to by Owen Evans are true. And further affiant saith not.

A. J. WOOLF.
LOUIS W. KING.

Sworn to before me by the said Louis W. King and A. J. Woolf on the 29th day of October, A. D., 1892.

J. J. HAMILTON,
Notary Public.

[SEAL]

FOR THE [illegible]

LEONORA AUGUSTA ARNOLD [illegible]
Complainants and [illegible]

against

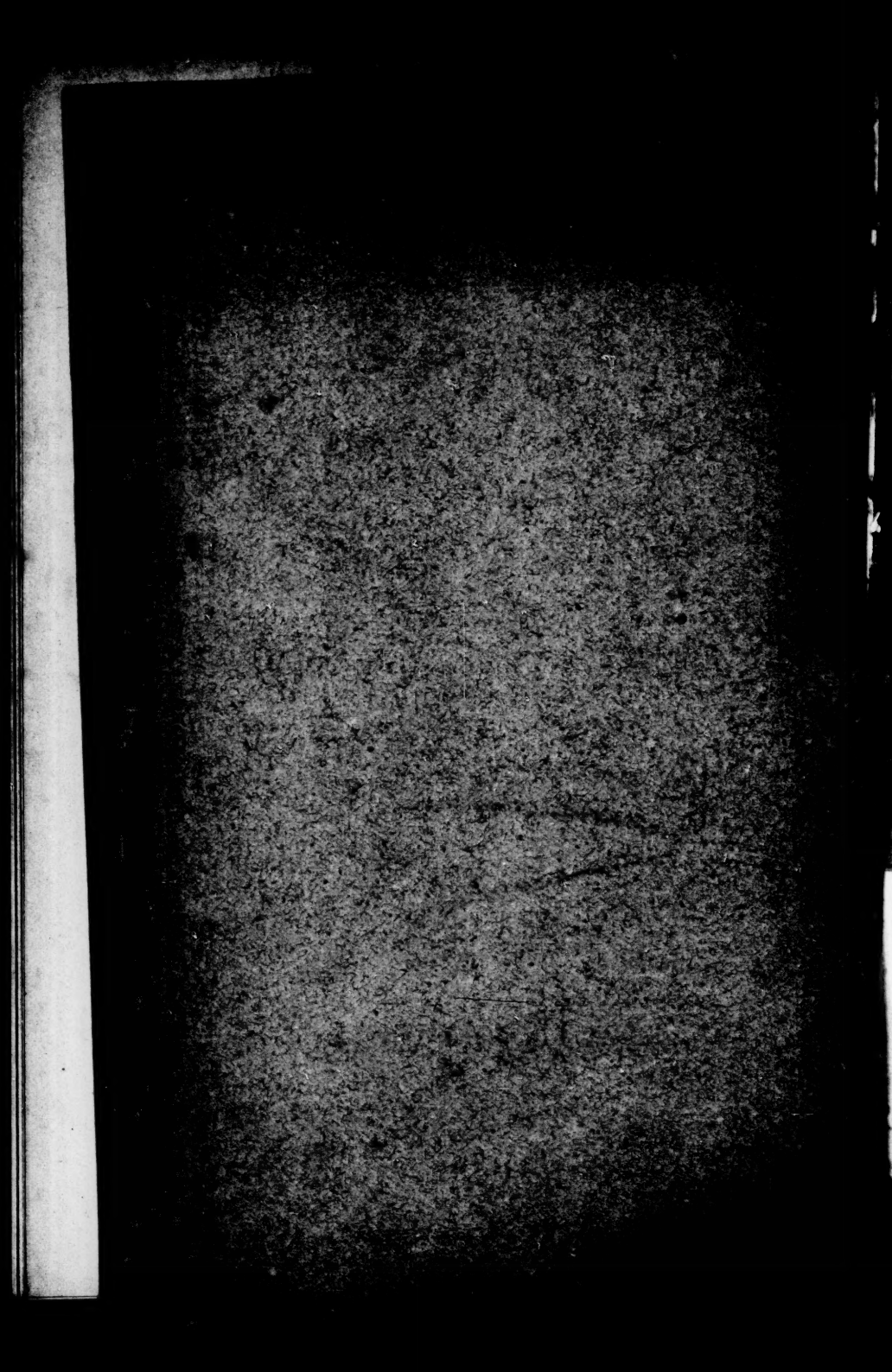
CHARLES A. CHEESEBROUGH [illegible]
Defendants and [illegible]

CERTIFIED TRANSCRIPT OF [illegible]

Of Proceedings had in the Circuit [illegible]
Appeals for the Second Circuit

VOL. X.

PRINTED UNDER THE DIRECTIONS OF THE CLERK



At a Term of the United States Circuit Court of Appeals for the Second Judicial Circuit, held at the United States Court and Post-office Building in the City of New York, on the 1st day of March, 1893. 1

Present—Hon. WILLIAM J. WALLACE, *C. J.*
E. HENRY LACOMBE,
NATHANIEL SHIPMAN, } *JJ.*

LEONORA A. ARNOLD,
Appellant, 2

vs. No. 77.

CHARLES A. CHESEBROUGH et al.,
Appellees.

This case having been reached in its regular order upon the day calendar, and called, the appellee having moved for a postponement upon the ground of a second appeal in the case pending in the Supreme Court of the United 3 States, which motion was denied;

And it appearing that the appellees have filed their brief in the case, but that no brief has been filed on behalf of the appellant;

Now, on motion of Walter S. Logan, for the appellees,

Ordered, That the appellants' brief be filed herein on or before the first day of April, 1893, and in default

4 thereof that this appeal be dismissed with costs to the appellant.

W. J. W.
N. S.
E. H. L.

Indorsed:

Order and notice of entry. Filed March 1, 1893.

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5 At a Stated Term of the United States Circuit Court of Appeals for the Second Judicial Circuit, held at the United States Court and Post-office Building in the City of New York, on the 3d day of May, 1893.

Present:

Hon. WILLIAM J. WALLACE, *C. J., Presiding.*
NATHANIEL SHIPMAN, *Circuit J.,* } *Associates.*
HOYT WHEELER, *District Judge,* }

6 LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as Executrix of the Last Will and Testament of Stephen R. Lounsbury, deceased,
7 Defendants and Appellees.

No. 77.

Appearances—JOHN H. V. ARNOLD, of counsel for complainants and appellants; WALTER S. LOGAN, of counsel for defendant and appellee, Chesebrough.

MAY 3, 1893. 8

Mr. Arnold is heard on behalf of complainants and appellants.

Mr. Logan is heard on behalf of defendant and appellee, Chesebrough.

ARNOLD et al.

vs. 9

CHESEBROUGH et al.

MAY 4, 1893.

The above-entitled case being still on argument, Mr. Logan concludes his argument on behalf of defendant and appellee Chesebrough.

10

Mr. Arnold was heard on behalf of complainants and appellants in reply. Cause submitted. Decision reserved.

11

12 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

LEONORA AUGUSTA ARNOLD et al.

vs.

CHARLES A. CHESEBROUGH et al.

13

Opinion.

WHEELER, *District Judge*—In 1853, Blasius M. Chesebrough, afterwards known as George M., was about thirty-five years old, a son of a widow of large means, and had some property of his own, and was a brother of the defendant, Charles A. Chesebrough; Josephine Cregier was about sixteen years of age and the daughter of a widow; both were born and all lived in the City of New York.

14 They met at a dancing-school in Bond street, in a building where he had rooms, and she stayed with him in his rooms that night, and lived with him some time afterward before any pretense of marriage. On the 18th of August, 1854, they registered as husband and wife with servant at the Everett House and lived there as such, excepting an absence of a few days, until October 6. They lived together at other hotels and boarding-houses in the same way afterward, and had a carriage and driver and drove about the country somewhat. About September 20, 1855, they
15 drove to Saratoga and registered at a hotel there as husband and wife. A child was prematurely born to them there, which lived but a few days, and was buried in a lot in the cemetery there which he procured. They continued to live together some part of the time at hotels and boarding-houses in the same manner, and were to some extent spoken of as husband and wife among acquaintances. In the summer of 1857, she went to her mother's, and on October 9 the plaintiff was born there and was their child. Dr. Groves attended

her in her confinement, and made return of the birth as required by law, to the registry, with the name of the father as George Chesebrough, and of the mother as Josephine Chesebrough. Her mother, on April 6, 1858, commenced a suit against him for board of himself and family for the six months previous, and on appearance by him recovered judgment for $175. At times when drunk he was very violent, and treated her with great abuse. At sometime in 1858 she suddenly left him and her child and went without his knowledge to Charleston, S. C., and lived with another man there. Dr. Groves commenced suit in December, 1858, against him for attendance upon her when the plaintiff was born and recovered jugdment therein upon default. On February 4, 1859, her mother commenced suit against him for loss of services by her seduction resulting in the birth of the plaintiff and on default and inquest of damages, recovered judgment therein for $2,500. He tried to find her, but died in 1866 without having heard from her. 16 17

This suit is brought in behalf of the plaintiff, Leonora Augusta, as his heir. Her mother was present at the examination of witnesses in behalf of the plaintiffs, and testified that in driving about they drove to Baltimore and were married there in 1854, before going to the Everett House to board; afterwards she testified in behalf of the defendant that this was false, and that they were never married, and never understood that they were, but that they agreed to be married when his mother should die. 18

The Circuit Court found and held that there was no marriage and dismissed the bill. The assignment of errors upon this appeal relates principally to this ruling. 19

There is no presumption of legitimacy arising from parentage (Blackburn *vs.* Crawford, 3 Wall., 186); but cohabitation as husband and wife is presumed to be lawful and legitimacy may be found from it; although if it was illicit in the beginning, the presumption is rebutted until a marriage is shown which would change its character (2 Green. Ev., 462). Jewell *vs.* Jewell, 1 How., 219; Gaines

20 *vs.* New Orleans, 6 Wall., 642.) The mother's testimony that there was a marriage remains in the case, although retracted, and is strongly corroborated by their holding themselves out as husband and wife and living together openly as such at respectable hotels and boarding-houses; and particularly by their recognition of each other as married parents at the time of the death and burial of their first child. She could destroy the force of her testimony so far as it rested upon her truthfulness, but it could not take it away from the
21 support of this corroboration. Her first testimony was consistent with their acts and conduct, but the last was not. The theory of a marriage is further supported by the registry of the birth, for the mother would not become Josephine Chesebrough but by marriage; and it is further strongly supported by the judgments against him for her board as a part of his family, and for the physician's services at the birth of the plaintiff, for he would be liable for neither if she were not his wife. This theory is also somewhat supported by the reputation of a marriage among
22 their relatives, friends and acquaintances; but this is met by proof of reputation to the contrary. The proof of reputation could be done away with by counter proof of the same sort, but proof of a marriage in fact by direct evidence or by acts and conduct of the parties could not be disproved by evidence of reputation to the contrary (1 Green. Ev., s. 107). Mr. Justice Davis, in Gaines *vs.* New Orleans, 6 Wall., 706, said: "Concede it is true that Clark behaved so as to cause his most intimate friends to disbelieve the fact of marriage; that he held himself out to
23 the world as a single man, and by public repute after the time of the alleged marriage lived with Zulime ostensibly not as his wife; still the case of the complainant is not weakened." There, as here, the cohabitation began meretriciously, and ended in desertion of the father by the mother, and unlawful cohabitation by her with another man. As marriage is in law but a civil contract between the parties, resting upon their consent, although most often celebrated by religious ceremony, the open public registration of their true names as they would be if married in noted and

respectable hotels of the city and in the neighborhood 24
within the city of their former homes, and of the homes of their relatives and friends, and living there in sight of all as it married, would be direct manifestation of the consent upon which the contract would rest, and stronger evidence of its existence than any negative reputation which would necessarily be founded upon mere hearsay. He was dissipated, a frequenter of bawdy houses, and an associate of lewd women; but the mother of the plaintiff appears to have been more and different to him than any other woman. Reputation of his marriage would not be likely to 25
spread to these places, or among these women; and his reputation of being single appears largely from these sources. He made conveyances as a single man, and had a draft of a will made which did not mention her or the plaintiff after she had left him, which goes to show that he then held himself out as single, and administration was applied for on his estate as if he had died single; which goes to show that he was to those making the application then reputed to be single. The record of this suit for seduction seems to be admissible as a declaration by her 26
mother which would tend to show family understanding that there was no marriage; but the judgment was not between such parties as to be at all conclusive of anything. This is all reputation, and not direct proof, and is to be considered in connection with other proof in arriving at what the extent and pervasiveness of the reputation of marriage or no marriage ~~really~~ actually was. When all this is considered, it shows, as found by the Circuit Court, a reputation too much divided to prove a marriage; it is
also too much divided to disprove a marriage, otherwise 27
shown, if admissible at all for that purpose. Their acts and conduct toward each other corroborating and making plain her testimony that there was a marriage in fact, remain. That the registration of their names as, and calling themselves, husband and wife, was necessary for admission to decent places, and that men and women do so for the purpose of living together at such places, is said in argument, but such use of their true names in such and so many prominent places, in the near vicinity of their

28 relatives and acquaintances, and in the city of their own
birth and home, does not seem attributable to that mere
purpose, and that no such custom is proved or appears to
be sufficiently general to be taken judicial notice of. That
men live double lives under different names in the same
city, and that men and women register at places as hus-
band and wife under other names for the purpose of liv-
ing together there temporarily, may be assumed; and that
such holding themselves out would have no tendency to
prove that they were husband and wife, but rather the
29 contrary. The difference between using false names and
true ones wholly changes the effect of the use as proof. And
this purpose of living together temporarily does not ex-
plain their traveling together under their true names as
husband and wife just before the birth of their first child,
and burying it as theirs in that relation. Although her
first testimony in view of her last would be entitled to no
weight alone; and these acts and this conduct might not
be sufficient to establish a marriage against her last; her
first furnished a key to and is more consistent with all
30 these than the last; and helps out and confirms the proof
of a marriage in fact.

That both treated the bonds of matrimony lightly would not show that they did not lightly or otherwise enter into them. The greatest argument against the presumption arising from this holding each other out as husband and wife and cohabitation, is founded upon the supposition that the cohabitation began meretriciously, but this rests wholly upon her testimony. Take that out and the first co-
31 habitation shown was at the Everett House, where they had registered and lived together openly as husband and wife. But her testimony cannot be taken out, for it is in, and must be considered first and last and all together according to its consistency with itself and other proved facts.

When so considered, that part which states that they were married while away just before going to the Everett House seems more consistent with their going there and living together as they did, there and elsewhere, long

enough to bring forth two children in due course, then her subsequent statement that this was false, and that the marriage was to take place when his mother should die. 32

And to hold that acting as husband with a woman means what it purports, as assuming other capacities does, and legitimate issue, seems more wholesome than to interpret it away by comparison with false pretenses of others in similar aspects, and bastardize issue.

Furthermore, as laid down by Sir William Blackstone, any contract made *per verba de presenti*, and in case of cohabitation *per verba de futuro*, was deemed a valid marriage (1 Comm., 465). This is so laid down by Chancellor Kent, 1 Comm., 87, and by Professor Greenleaf, 2 Ev., § 460. 33

The Circuit Court for the District of South Carolina so charged the jury in Jewell *vs.* Jewell, 1 How., 219, and the Supreme Court being equally divided, did not reverse this ruling. The testimony of the mother as to the agreement to marry is not retracted, nor contradicted, and is corroborated by the same circumstances as her testimony of the marriage. If this be true, and that be law, the plaintiff is legitimate. 34

Indorsed:

Opinion filed Oct. 24, 1893.

35

36 U. S. CIRCUIT COURT OF APPEALS.

ARNOLD et al.,
Appellants,

vs.

CHESEBROUGH et al.,
Appellees.

37

Opinion.

WALLACE, *Circuit Judge*—The dismissal of the bill of complaint by the decree of the Circuit Court proceeded upon the ground that Leonora A. Arnold, the principal complainant, was not the issue of a marriage between her mother and Blasius M. Chesebrough. The question which this appeal requires us to decide is whether Mrs. Arnold's father and mother were husband and wife. The decision
38 depends upon the effect of direct evidence relative to a ceremonial marriage between the parents and of indirect or presumptive evidence indicating the matrimonial relation arising from their cohabitation and repute, conduct and declarations.

In such actions, the burden of proof is upon the party who asserts the marriage; but the law presumes from considerations of decency and public well-being that every competent couple who ostensibly cohabit as husband and wife, demeaning themselves toward each other as such, and
39 received into society and treated by friends and relatives as being entitled to that status, have been legally married. This presumption is indulged with special cogency when the legitimacy of the offspring is the issue for judgment. A perfect marriage may be constituted by the consent of the parties to live together as husband and wife as well as by a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the deduction, as well as by direct evidence. But in the absence of direct proof, marriage cannot be proved by cohabitation

alone, however long maintained; the evidence must support a matrimonial cohabitation as distinguished from a meretricious one. (Commonwealth *vs.* Stump, 53 Penn. St., 132; Rose *vs.* Clarke, 8 Paige, 573; Cunningham *vs.* Cunningham, 2 Dow's Parl. Rep., 482.) The facts that parties have publicly acknowledged either other as husband and wife, have assumed the marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them. Both cohabitation and reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage. A divided repute, however, is of no efficacy. It must be a general and consistent one to be of value. We have to apply these rules of evidence to a voluminous mass of testimony, much of which is untrustworthy and eliminating from consideration much in the record which is incompetent. We cannot undertake to recapitulate the testimony or analyze it in detail, as it would serve no useful purpose to do so.

The facts in outline are these: Leonora A. Arnold was born in New York City on October, 1857. Her father was Blasius M. Chesebrough, and her mother was Josephine Cregier. The father and mother met at a dancing-school in New York City, where they both resided in 1854, and on the evening of their first meeting she accompanied him to his rooms and remained with him during the night. She was then about 16 years of age and was living with her mother, who kept a boarding-house. He was about 35 years of age, and was an ostentatious, dissolute, lewd, eccentric man, addicted to drink, capricious and extravagant. He had studied law, but becoming enamored of the stage he had devoted himself to theatrical enterprises. He associated generally with low companions. He had inherited some property, but derived the larger part of his income from the allowances made to him by his widowed mother, a woman of wealth, whose children seldom visited her except to obtain money, and who led an isolated life. He had one brother, but seldom

met him. Shortly after the episode mentioned Josephine left her mother's house and went to live with him. They lived together at various hotels and boarding-houses in New York City from 1854 to 1858. Whether they lived together continually does not satisfactorily appear, but they certainly lived together the greater part of the time. She went by the name of Chesebrough, and they held themselves out as husband and wife whenever it seemed expedient or desirable to do so; but she passed as his mistress among those of his associates to whose opinion of his respectability he was indifferent. They made occasional journeys, sometimes with his own equipage, to distant parts of the country. In September, 1855, while they were at the United States Hotel at Saratoga Springs, a child was born to them, died at its birth, and was buried at that place. It would seem that they selected this place, after the close of the conventional season, to have the accouchment take place there. When the birth of a second child, Leonora, was expected, they went to live with Mrs. Cregier, Josephine's mother. Leonora was born at Mrs. Cregier's house.

He was frequently intractible, and when in drink was quarrelsome and violent. Apparently she wearied of his caprices and abuse. In 1858 she left him clandestinely, going first to South Carolina, and subsequently to Tennessee and lived, while in these States, with one Jackson, as his wife. Leonora was left in the meantime at the house of Mrs. Cregier. Her father did not support her and she was provided for by Mrs. Cregier, until the latter's death, which took place in 1870. In 1858 Mrs. Cregier sued him for six months' board of himself and family, and obtained judgment for $175. In 1859 Mrs. Cregier brought suit against him for the seduction of Josephine, claiming in substance that the relations had been illicit while he and Josephine lived together, and that Leonora was the fruit of their unlawful cohabitation. Mrs. Cregier and one of Josephine's sisters were witnesses at the trial of that suit. Blasius did not interpose any defense, and a judgment was

obtained against him for $2,500 and subsequently col- 48
lected.

Mrs. Chesebrough, the mother of Blasius, died in 1860, and he then succeeded to a large property. He died in 1866, having lived as a bachelor since Josephine left him, ignorant of her whereabouts. He left no will. Leonora and Mrs. Cregier attended his funeral. In 1868 Josephine returned for a time to New York. While there, she, with with her mother, consulted counsel with a view of enforcing any rights which could be claimed by them or Leonora 49
against the estate of Blasius. Soon after her grandmother's death Leonora made a visit of a few months to her mother in Tennessee, and then returned to New York. Thereafter she lived part of the time with her relatives, and part of the time supported herself by her own exertions. Between the visit to her mother in 1870 and 1880, she never heard from her mother. In 1879 Leonora married Mr. Arnold, and in the fall of that year, induced by the representations of designing persons who had been conversant with the affairs of Blasius, he began to collect 50
evidence to set on foot the attack which culminated in the present suit.

In 1880 Leonora went to Tennessee to find her mother and secure her assistance and found her. Shortly afterward, Josephine came to New York. Until this time neither of them had taken any legal proceedings founded upon any alleged rights as the wife or daughter of Blasius.

The only record of a ceremonial marriage which appears 51
in the record consists of the testimony of Josephine, the alleged wife. She testifies as a witness for the complainants, that after she and Blasius had lived together some time they went to Baltimore, Maryland, and were married there by a clergyman, at his house. She could not give his name or residence and stated that no witnesses were present. She made no mention of a marriage certificate, or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place,

or the person performing it, or the attending circumstances. It suffices to say of it that it was improbable and incredible. She did testify, however, that while in Baltimore they stopped at Barnum's Hotel. It is in proof that no persons of their name were guests of that hotel. There was no publication of marriage, and no license to marry; and in the absence of a license it would have been a criminal offense on the part of the clergyman to perform the ceremony. At a later stage in the taking of the proofs, she testified as a witness for the defendants, and made a complete retraction of her previous testimony relative to a ceremonial marriage. She then testified that there never was a ceremonial marriage, and that during the time they lived together she never considered or believed herself the wife of Blasius. When asked, however, if anything had been said between them relative to a marriage, she stated that he had promised her that he would marry her when his mother should die, but she gave no details as to the time, occasion or circumstances of such a conversation. Of course, no credit ought to be given to the testimony of a witness who has committed bald perjury. We cannot say whether she testified truthfully in her original or in her subsequent testimony. Certainly, if any of her statements can be accepted as credible, it is only those which it would be against her probable interest or inclination to make. We may believe that on the first occasion when she met Blasius she surrendered her person to him, and that she lived with him for some period of time before the alleged ceremony of marriage, and that she left him clandestinely and lived in the South as the wife of another man, until after his death. She testified to these facts originally, when she was trying to appear as a semi-respectable woman, and as to them, did not recant in her subsequent testimony; but her testimoney is worthless as to every other material fact which she might suppose would be of benefit to either of the parties.

We must reject as unworthy of credit the direct evidence of marriage. If there was a promise to marry her

at some future time, *cum copula*, there was no marriage according to the law of their domicile. 56

Cheney *vs.* Arnold, 15 N. Y., 345.
Meister *vs.* Moore, 96 U. S., 76.

The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blasius, satisfies us that the relation was a meretricious rather than a lawful one.

As the question is wholly one of facts, we shall content ourselves with a few general observations upon the proofs. 57

Irrespective of the admissions of Josephine, the testimony satisfies us that the cohabitation was illicit in its origin. This being so, it is presumed to have continued illicit; and all presumptions in favor of the innocence and morality of the parties are repelled. Men sometimes marry their mistresses, but such cases are the exception. After there has been an open illicit commerce they seldom accord to the woman who has forfeited all claims to her own self-respect and to the countenance of her friend the rights of a wife. The ordinary presumption against a subsequent marriage is stronger than usual in this case, because each of the parties regarded the marriage tie with contempt. He was a frequenter of houses of ill-fame. Her notions of propriety are shown by her summary abandonment of her infant child, and becoming the mistress of Jackson. 58

The reputation of the relation was at best a divided one. It was convenient, and, indeed, for some purposes was necessary, that they should maintain the semblance of a matrimonial relation. If they had not done so, they would not have been received in such hotels and boarding-houses as suited his ambitious tastes. Some of their acquaintances would have ignored them. Tradesmen would have been less indulgent. Even their servants would have treated them with less civility. It would be strange if some of those with whom he came in contact had not been led to believe 59

him to be married. None of his relatives supposed him to be married. His boon companions understood her to be his mistress. Some of her relatives and acquaintances doubtless believed that she was his wife. No one was so near to her, nor so likely to have a better appreciation of the true nature of the cohabitation as her own mother. Mrs. Cregier was a hard-headed, practical woman. What she believed is sufficiently shown by the record of the seduction suit.

Convincing evidence that they were not husband and wife is found in their own conduct. Unless they had so deported themselves that it was notorious that she was only his mistress, there was no reason why he should not have introduced her to his mother as his wife. Neither her education, her manners or her social surroundings stood in the way. There was nothing except her relations with him. Old Mrs. Chesebrough would have rejoiced to know that her son had married a decent woman. As a married man who had finally concluded to change his mode of life, he could have appealed more effectually than before to his mother's bounty.

If Josephine had been his wife, why should he have made a secret of the fact and represented her deliberately to decent ~~people~~ persons as being only his mistress. Such a significant episode as that detailed by the manager of the Clifton House, at Niagara Falls, where they represented themselves as husband and wife until they quarrelled, but finally admitted what their true relation was, cannot be explained away upon any theory of his eccentricities. He was not so utterly bereft of manly impulses as to permit her, if she were his wife, to be ejected from the hotel as a mistress, and sent to New York, while he continued to remain there as a guest. He made conveyances of real estate as a single man. He submitted without protest to the making of a judicial record which branded her as a concubine, and his child as a bastard. Her conduct in leaving him without making any claim against him for support, and in making no such claim during his life, or against his estate until fourteen years after his death, proves almost irresistibly

that she knew she could not establish such a claim. She knew of his death about the time it took place, must have known as his wife she could secure a comfortable fortune from his estate, and she had consulted astute counsel. We place but little stress upon the circumstances that he did did not recognize Leonora as a legitimate child by any testamentary disposition. We are not satisfied that he knew the contents or the effect of the will which was drawn but not executed. He always acknowledged her paternity, and evinced sometimes some interest in her, and even affection for her. He would not have been unwilling to curtail the inheritance of his brother even in favor of an illegitimate child. Yet there is proof that no single act of his toward Leonora, after her mother left her, to indicate that he regarded her as having any lawful claim upon him. 64 65

Mrs. Cregier was a capable and energetic woman. She took the place, after Josephine disappeared, of father and mother to Leonora. She knew how to find plenty of lawyers to take up litigations upon contingent rewards. When Blasius died, and the proofs were fresh of the relation between him and Josephine, the time had come when she could have asserted Leonara's rights, if she had any, with the prospect of securing for her grandchild, and incidentally to herself, the comforts of an ample fortune. But although she and Josephine concerted together, surveyed the ground and consulted enterprising counsel, no attack was made throughout the four years she lived after the death of Blasius. Her action is unaccountable, except upon the theory that she felt satisfied there was no case sufficiently strong to warrant the attempt. She speaks from the grave, an unsummoned witness, whose testimony is more persuasive than that of a score of persons, who with fragmentary knowledge or confused recollection speak of incidents which took place twenty years before. 66 67

It has been observed by the Courts, that the concomitants of those living in illicit intercourse together are often identical with those of married people.

Breadalbane *vs.* Breadalbane, H. L. S., 182.
Goldbeck *vs.* Goldbeck, 18 N. J. Eq., 42.
Barnum *vs.* Barnum, 42 Md., 251.

68 It is not surprising that to some extent there should have been a repute that Blasius and Josephine were married. It is not strange that Leonora, a motherless child, practically, should have gone by the name of Chesebrough. It is not strange that the infant, who died at the hotel where they had registered and lived as though they married, should be buried as the child of Mr. and Mrs. Chesebrough. In our judgment there is hardly an established fact in the record which is inconsistent with the theory that they held themselves out as husband and wife merely for motives of
69 expediency, while the presumptions from facts well proved, and the considerations arising from most demonstrative conduct, denote that the real relation did not exist.

The decree is affirmed with costs.

Indorsed:

Opinion filed October 24, 1893.

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71

CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND JUDICIAL CIRCUIT.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

To the Honorable The Circuit Court of Appeals of the United States for the Second Judicial Circuit:

Petition for re-hearing after decision, by special leave granted during the Term.

The petition of the complainants in this action and the appellants in this Court for a re-hearing of the appeal in this case and a reversal of the decree herein, respectfully show to this Court, and briefly and distinctly state the grounds of this petition as follows:

First—They respectfully submit that this Honorable Court was misled into holding that the cohabitation between Blasius and Josephine was illicit in its origin, as stated on the eighth page of its opinion.

76 *Second*—They respectfully submit that this Honorable Court was misled into holding that the reputation of the relation between Blasius and Josephine was at best a divided one, as stated on the same page of its opinion.

It is respectfully submitted that the existence or non-existence of these two facts is of vital importance to these appellants upon this appeal, for the reason that the decision of this Honorable Court is based mainly, if not entirely, upon the assumption that these two facts were established
77 by the proofs in this case.

With regard to the first of these grounds, your petitioners respectfully show and allege that there is no evidence whatever, outside of the testimony of Josephine herself, which, in the slightest degree, tends to show an illicit origin in the cohabitation between herself and Blasius M. Chesebrough.

All the other evidence in the case commences with their cohabitation as husband and wife at the Everett House in
78 the City of New York on or about the 18th day of August, 1854, where they openly and publicly first cohabited, and that, too, as husband and wife, under the name of G. M. Chesebrough and wife.

This is testified to by Josephine's sister, Almira Sisson, who says that Blasius and Josephine returned from Baltimore to her mother's house and announced that they had been there and got married, and that from their house they went to the Everett House to live (pages 1179 and 1183,
79 volume 3).

This testimony of Almira Sisson is corroborated by the wife of the proprietor of the Everett House, and by the bookkeeper, and also by the books of that hotel (pages 70–75–65, volume 1, and pages 1539 to 1544, volume 4).

This testimony is also corroborated by that of Peter Staeden, the barber of Blasius, to whom Blasius stated that he had just returned from Baltimore, where he had been

married to Josephine, and to whom he publicly introduced Josephine as his wife (pages 88 to 90, § 106, §§ 120 to 124, § 151, volume 1). 80

Almira Sisson also states that while they were living at the Everett House they went to her dressmaker's for dresses, etc., and that while there he represented to her dressmaker that he and Josephine were married (pages 1185, 1186, volume 3).

And this testimony of Almira's is corroborated by the dressmakers themselves, who say that he called her his wife, meaning Josephine, and said to them that his wife was extravagant, and that he came there personally with Josephine when ordering her dresses, and paid for them (pages 156 and 170, volume 1). 81

This was the commencement of their cohabitation, so far as any testimony outside of Josephine's was concerned, and it certainly does not show any illicit or meretricious origin in it. The cohabitation is shown by the testimony of Josephine's sister (corroborated by other witnesses) to have been continuous and without interruption down to their separation four years afterward. 82

Now, with regard to Josephine herself upon this subject, it appears upon her first examination that they first became acquainted with each other about six months prior thereto at Sirrocco's Dancing Academy, in Bond street; but she does not testify upon her first examination that she accompanied him to his rooms and remained with him during the night, as stated on the third page of the opinion of this Court. Such statement is only to be found in her examination when called as a witness for the defendant, and when, of course, if bribed to deny a marriage, she was also bribed to make any other statement which counsel deemed necessary to destroy the effect of her first testimony (pages 304 to 307, volume 7). 83

Upon her first examination she only states that she lived with him as his wife a *very short* time before they went to Baltimore to be married, under a promise on his

84 part that he would marry her, which promise he kept by marrying her there (volume 3, pages 1387–1392).

Now, certainly it would seem that if her statement that she lived with him a short time before the ceremony was performed under a promise that such ceremony should thereafter be performed, then her statement that thereafter the ceremony was performed is also to be believed; but if her testimony that such promise was kept is to be wholly disregarded, then the remainder of her testimony,
85 that her living with him for a very short time under such promise should also be disregarded.

As tending to show that this claim of Josephine's, upon her first examination, that Blasius kept his promise by marrying her in Baltimore, as she states, is untrue, the Court has found, on page six of its opinion, that "it is in proof that no persons of their names were guests of that hotel" (meaning Barnum's Hotel); but it is respectfully submitted that this Honorable Court was
86 misled into making such a finding, for the following reasons: It has always been claimed and conceded that Blasius and Josephine first met in January or February, 1854, and that they were married in Baltimore in the summer of that year, if there at all. The books of the Everett House hotel show that they began to live at that hotel as G. M. Chesebrough and wife in the early part of August, 1854, and the bookkeeper and the wife of the proprietor of that hotel testify that 1854 was the year that they went there to live (pages
87 1539 to 1544, vol. 4). Therefore it must have been in 1854, if at any time, that Blasius and Josephine were at Barnum's Hotel in Baltimore, as she first testified to. Now, the defendant's witnesses do not claim to have produced the registers of that hotel for that year, but for entirely different years instead, viz., 1853, 1855 and 1856, when, of course, no such persons were guests of that hotel. The defendant's witnesses distinctly state that they have not the register of that hotel for that year (vol. 7, p. 203, and vol. 8, p. 248); and although, as held by this

Court on that page of its opinion, no license to marry having first been obtained would have made it a criminal offense on the part of a clergyman in that city to perform the marriage ceremony; yet one of the defendant's own witnesses testifies that he, without such license, had performed such ceremonies (vol. 8, p. 292). And the Supreme Court of the United States has held, in the case of Meister *vs.* Moore, 96 U. S., 76, that a marriage performed in that State without such license was valid. 88

So that we see, from the proof in this case, that, without the testimony of Josephine herself, it is not shown or claimed to have been shown, that the cohabitation between herself and Blasius was illicit or meretricious in its origin, and such an improper relation is founded solely upon her second testimony, when, of course, she would testify to anything deemed necessary by the defendant's counsel to destroy the complainant's case. 89

This Court holds, upon seventh page of its opinion, that because of Josephine's perjury, her whole testimony upon both examinations is to be wholly disregarded. If this be so, then it is respectfully submitted that this Honorable Court was misled into holding that, irrespective of her (Josephine's) testimony, the proofs in this case show that the cohabitation between Blasius and Josephine was illicit in its origin. 90

Now, with regard to the second ground of this petition, namely, that the reputation in regard to the relationship between Blasius and Josephine, was divided, we respectfully submit that it was not divided, for the following reasons: 91

The following named persons, whose testimony will be found upon the pages hereinafter numbered, all testify to having known both Blasius and Josephine, or to have known of their living together, and that it was reputed, and they understood, that they were man and wife, and that they never saw or heard anything to lead them to suppose for a moment that they were anything else.

92 Christian S. Storms, a cousin of Blasius, who knew and saw Josephine, and to whom Blasius himself stated that he was married (volume 2, page 522).

Eliza Storms, another cousin, who testifies that it was understood in the Chesebrough family that they were married, and that the family knew of their living together, and who also testified that Blasius' own mother, Margaret Chesebrough, told her of their marriage at the very beginning of their cohabitation, in 1854, and said to her that
93 Blasius had asked for an increase of his allowance in order to support her (volume 3, page 991).

Mrs. Martha Fitzgerald, another cousin of Blasius, who testifies that the living together of Blasius and Josephine was known to the family, and that it was understood that they were married, and that Blasius' mother, Margaret Chesebrough, had stated to her that they were married, and that she had sent to Josephine when about to give birth to this complainant Leonora, a
94 suit of baby clothes for the child (volume 2, pages 949 and 950).

Philip B. Segee, another member of the Chesebrough family, testifies to the reputation in the Chesebrough family as to the marriage between Blasius and Josephine (volume 3, page 1415).

Almira Sisson, Josephine's sister, testifies in regard to Blasius and Josephine both announcing upon their return from Baltimore to her mother in her presence that they
95 were married, and that thereupon they immediately went to the Everett House to live as man and wife, and that it was understood in her family that they were married (volume 3, pages 1179 to 1183).

Mrs. Emeline Irving, a cousin of Josephine, also testifies in regard to knowing Blasius and Josephine, and meeting Blasius and being introduced to him as Josephine's husband, and that it was reported and always understood in their family that they were married (vol. 1, p. 381).

Mrs. Robert Franklin, another cousin of Josephine's, testifies substantially to the same effect (vol. 1, p. 425.) 96

Margaret A. Cregier, wife of George W. Cregier, another member of Josephine's family, testifies in regard to the reputation in that family as to a marriage between Blasius and Josephine (vol. 1, p. 479).

This makes eight members of the two families who knew or had heard of the cohabitation between Blasius and Josephine, and testified to its reputed matrimonial character, and who had never heard of anything to excite the slightest suspicion upon their part that it was otherwise. 97

Now we will take up the friends and acquaintances of the parties, who give similar testimony :

Edwin Wood, a personal friend and associate of Blasius M. Chesebrough, testifies in regard to his intimate acquaintance with Blasius both before and after his marriage and the introduction by Blasius of Josephine into the Wood family as his wife (vol. 2, p 487). 98

Lawrence Harran, who was a servant in the family during their cohabitation, testifies to its matrimonial character, and the introduction of Josephine by Blasius to various people as his wife (vol. 1, pp. 329 and 275).

Peter Staeden, an intimate friend to whom Blasius introduced Josephine as his wife, and to whom Blasius related an account of their trip to Baltimore and their marriage, and to whom he thereafter always referred to Josephine as his wife (vol. 1, pp. 88 to 90 and 106 and 120 to 124 and 151). 99

Elizabeth Blum, a woman who nursed Blasius in his last illness, and who was introduced to her as a married man by his intimate friend, General Storms, and to whom, in his last illness, he protested his undying love and affection for his wife and child (volume 3, pages 1526 to 1528).

100 William S. Kinch, a friend of Blasius, who visited them at the Waverly Hotel, and to whom Blasius always spoke of Josephine as his wife (volume 3, page 1382).

Mrs. Doubleday, a friend and acquaintance of Josephine before her marriage to Blasius, testifies to knowing of their cohabitation and of the recognition of Josephine by Blasius as his wife (volume 1, pages 156 and 170).

Mrs. Van Vleck, another friend and acquaintance of Josephine, testifies to the same effect (volume 1, pages
101 174–184).

Mrs. Fannie Post, who also testified in regard to the cohabitation as man and wife, and introduction by Blasius of Josephine as his wife (volume 1, page 7).

John Tully, who was clerk at the Everett House, where Josephine and Blasius first began to cohabit, and who testifies to the open and reputed matrimonial character of that cohabitation (volume 1, pages 71–75).

102 Mrs. Hulda Clapp, the widow of the proprietor of the Everett House, who testifies to the same effect (volume 1, page 65).

Mr. Samuel Mead, proprietor of the Smithsonian Hotel, where they resided, who testifies to the open and reputed matrimonial character of their cohabitation (vol. 1, pp. 186, 190, 191, 204).

James M. Marvin, the proprietor of the United States
103 Hotel at Saratoga, who knew Blasius and Josephine, and of their living together, and of the reputed matrimonial character of their cohabitation (vol. 1, p. 50).

Mr. Hiram Tompkins, one of the proprietors of the United States Hotel and of the Fifth Avenue Hotel in the City of New York, who testifies to the same effect (vol. 1, p. 39).

Daniel Goff, clerk at the Holdridge House and Clinton Place Hotel, where Josephine and Blasius lived,

also testifies to the open and consistent and reputed co- 104
habitation of them together as man and wife (vol. 1, pp. 210, 248 to 249).

Thus we see that the complainants have produced eight relatives and fourteen acquaintances and friends, all of whom testify of their own knowledge with regard to the cohabitation of Blasius and Josephine, and that it was of an open and matrimonial character, and reputed to be such among all persons whom they knew, so far as they heard, and without the slightest breath of suspicion as to any 105
other nature or character being cast upon it.

We will now proceed to consider what proof the defendants offer for the purpose of showing that this reputation in regard to their marriage was otherwise, or, as this Honorable Court calls it, "a divided one," on page 8 of its opinion.

They simply produce witnesses, some twenty-seven in number, principally actors and low characters, who testify simply to the effect that they never heard that Blasius was 106
married. None of these witnesses were closely enough related to him or sufficiently acquainted with his family affairs to have any reason for knowing anything to the contrary than what they testified to. They were simply so many people who testified that they knew Chesebrough in his lifetime, or were acquainted with members of his family, some of them stating that they were not even personally acquainted with him. Not a single one of them testifies to ever having heard or seen, or known of the existence of such a person as Josephine, or of any cohabita- 107
tion or living together of she and Blasius. None of them testified that he ever spoke to them of Josephine, or of any other woman as his mistress, as stated on page 9 of the opinion of this Court. They were simply so many people who had met or heard of Blasius, but who had never heard of his wife or that he ever had one.

No doubt the same number of persons can be found who can truthfully testify that they either knew or had heard of any other person, not excepting the members of

this Honorable Court, and that they had never heard that such person was married.

With regard to these witnesses and their testimony, is is respectfully submitted to this Honorable Court that within the rule of law laid down by the highest Court of this State, in the case of Badger *vs.* Badger, reported in the 88th N. Y., 552, that their testimony is wholly immaterial and does not in the slightest degree tend to show that the reputation as to the cohabitation between Blasius and Josephine was divided; and upon this point your petitioners respectfully beg leave to quote at length a portion of the opinion of that Court in this case, as follows:

"We are thus able to see what the precise question of "fact was. A continuous cohabitation for about thirty-"five years between these parties was established. It was "either meretricious or matrimonial, and all the evidence "properly admissible and touching that inquiry was such "only as tended to solve the doubt.

"The defendants were permitted to prove, under re-"peated objections and exceptions, that Jacob Badger "was reputed to be a bachelor and unmarried. This "proof was given by persons who were his friends and ac-"quaintances, but who knew nothing of the plaintiff, "were unconscious of her existence, and in total ignorance "of her cohabitation with the decedent. The repute thus "proven was not the product of the cohabitation, and "did not tend to explain it or solve its character. It "could not by any possibility bear upon it. It was "not its shadow, for it cast none into the lo-"cality where these witnesses were. It was the "shadow as a different and distant fact, which in itself "was not ambiguous and needed no explanation to relieve "its character of doubt. That the decedent lived a single "life without presence or appearance of wife or daughter "at his rooms when boarding with his sister was a fact "properly proved and clearly admissible. But that "among those who thus saw him, and before whom noth-

" ing had occurred to raise the question, he was reputed 112
" to be unmarried, was pure hearsay, explaining nothing,
" since there was nothing to be explained. The life of
" John Baker, in Macdougal street, was ambiguous, in
" the sense that it might indicate an illicit intercourse
" or a matrimonial connection. To ascertain which, the
" shadow it cast upon surrounding society could be ex-
" amined and studied usefully for the solution of the
" doubt. The life of Jacob Badger, in Joralemon street,
" was not ambiguous at all, and needed no help to solve
" its character. It is, indeed, said that the purpose was 113
" to show a divided repute, and so contradict the reputa-
" tion of marriage, which, to be effective, must be general.
" But the general repute proved, and that required to be
" shown, does not and cannot go beyond the range of
" knowledge of the cohabitation. If within that range
" there is a division as to the character of the fact, the
" divided repute merely continues the ambiguity and de-
" termines nothing.

" In Clayton *vs.* Wardell (4 N. Y., 230), the divided repute 114
" was of a marriage among some friends, and a disreputable
" connection among others; thus negativing a general re-
" pute of connubial intercourse among those having knowl-
" edge of the cohabitation. In Commonwealth *vs.* Stump
" (53 Penn. St., 135) the reputation shown related to the
" parties and their association, and was that they
" were not married. In Vincent's appeal (60
" Penn. St., 228), the husband lived two lives,
" as here, and his repute as a bachelor among
" those who knew him by his true name was proved; but 115
" no question was raised over it, and it was not allowed
" to prevail as against the general repute of marriage in
" the locality where both parties lived. It was treated as
" utterly ineffective to produce a divided reputation.

" In Lyle *vs.* Ellwood (L. R., 19 Eng., Case 98), the
" repute was divided, and that of marriage allowed to pre-
" vail, but it was among those cognizant of the cohabita-
" tion and having reference to it as a fact to be explained.

116 "We have been able to find no case where such evi-
"dence as was here given, upon its admissibility being
"challenged by objection, has been held competent. The
"evidence of reputation, when admitted, is an exception
"to general rules. It should never be allowed to stray
"beyond some useful or necessary purpose. In its appli-
"cation to cases of pedigree it is justified by difficulties of
"proof and confined generally to the family and relatives,
"whose knowledge is assumed, and who have spoken be-
"fore a controversy has arisen. In its application to the
117 "fact of marriage, it is more than mere hearsay. It in-
"volves and is made up of social conduct and recognition,
"giving character to an admitted and unconcealed co-
"habitation. But in its application to a man living in
"appearance a single life, it adds nothing to that fact;
"it creates no further contradiction to an intercourse
"carried on elsewhere under the appearance of matri-
"mony, and throws no additional light upon it. It
"amounts to bare hearsay, and the unsworn declarations
"of persons having nothing of the facts in controversy.
118 "In the present case, twenty-three different witnesses
"were allowed to testify to the reputation of the
"decedent as a bachelor, not one of whom
"before his death had seen or heard of the
"plaintiff, or known of her connection with him. We
"do not think this evidence was admissible. Its very
"volume and frequency indicates the danger it may have
"produced upon the mind of the Court, and we cannot
"disregard the error."

119 With regard to the testimony of the witness Samuel Shears, referred to in the opinion of this Court, it is respectfully submitted that he does not attempt to state that Blasius and Josephine are the persons who had the fracas at his hotel in regard to which he testifies, for he distinctly states in his letter to be found at page 1622 of volume IV., of this record, that he is unable to identify them as the persons to whom refers.

In the next place, even if they were the parties to whom Shears refers, his testimony only relates to a single occur-

rence, at a time when Blasius was crazy with drink, and for which he thereafter apologized, and does not in any wise relate to the general reputation of the cohabitation between Blasius and Josephine. 120

The witness Frederick Geissenhainer does not attempt to state that the person concerning whom he and Blasius had a conversation some six months prior to the time that it is claimed that Josephine and Blasius were married related at all to her. He simply states that it was some lady whom Blasius called "Josephine" (pages 328 and 332, vol. VI). And it is testified to by other witnesses for the defendant that before his marriage Blasius had a lady friend other than the person in question by the name of "Josephine" (vol. VI., pages 255 and 264). 121

But to put this question entirely at an end, Josephine herself, when called as a witness for the defendant, denied that she and Blasius were ever in the house in Dey street together, or that she ever knew or saw Frederick Geissenhainer, or any other person there; and therefore it cannot be said that Blasius ever spoke to Geissenhainer of this Josephine as his mistress (volume VII., pages 292–304). 122

The declarations of Blasius to which this Honorable Court refers upon page 7 of its opinion were all made after he and Josephine had separated. These alleged declarations in no wise referred to Josephine or their cohabitation together, but were only to the effect that he "wouldn't marry the best woman living." 123

The Court below in this case held that such declarations were incompetent evidence, and the highest Courts of this State and the Supreme Court of the United States have held to the same effect.

Therefore we respectfully submit that this Honorable Court was in error in holding that such declarations

124 tended to show that the relation between Blasius and Josephine was a meretricious rather than a lawful one.

See

Van Tuyl *vs.* Van Tuyl, 57 Barb., 235.
Clayton *vs.* Wardell, 4 N. Y., 230.
Matter of Taylor, 9 Paige Ch., 611.
Jewell *vs.* Jewell, 1 How., U. S., 219.

Now, with regard to the judgment roll in the suit of Rachel Cregier against Blasius M. Chesebrough, which
125 was introduced in evidence, and to which this Honorable Court refers several times in the course of its opinion, we respectfully submit that said judgment roll does not in any wise tend to show a divided repute with regard to the character of the cohabitation between Blasius and Josephine, for several reasons, to wit:

First—It alleges that the seduction, if any, took place prior to the time that it is claimed that the marriage between them took place.

126

Second—The highest Court in this State, in the case of Eisenlord *vs.* Clum, 126 N. Y., 552, has distinctly held that such judgment roll is incompetent, and does not tend to show the character of the cohabitation between the parties, and this is so even where declarations of the father in regard to the same were allowed to be testified to as in that case.

That decision is founded upon decisions of the highest Courts of England, and there are no decisions of any
127 Court in this country holding to the contrary.

And its use in this case as evidence cannot be sustained upon any principle or authority, and none are cited in the opinion of this Honorable Court in support of its use.

In the next place, this Honorable Court states upon page 5 of its opinion that Blasius attempted to interpose no defense whatever to his suit. And we claim that in this respect it was misled into error in so stating, for the

reason that his answer, consisting of a general denial of 128
each and every allegation contained in the complaint in that action, and verified by his own oath, is in evidence, and to be found at page 14 of vol. IX.

In the next place, after judgment had been taken by default against him at the Trial Term of the Court in which that suit was pending, he moved promptly to have such inquest vacated and set aside and to be allowed to try the case upon its merits, and to substantiate the defense which he had pleaded in his answer; but his brother, the 129
defendant in this case, for the very purpose of making use of such judgment roll as evidence in any case which might thereafter be brought by his child, prevented such inquest from being opened, paid the amount of the judgment with his own checks, and abstracted from the records of that Court the very affidavits and motion papers used by Blasius for the purpose of opening such default (pages 1674–1675, vol. IV., and pp. 280 and 395, vol. IX.)

With regard to the statement contained in the opinion 130
of this Honorable Court that neither Josephine nor Rachel Cregier brought any suit to establish the rights of Josephine as his widow for fourteen years after his death, we respectfully submit that it is in evidence that they honestly and earnestly endeavored to get Lawyer Crosby to bring such suit shortly after Blasius' death, but that he refused to do it because they had not the money with which to maintain its prosecution, and it is respectfully submitted that they could not expect to get any other
counsel to do what Mr. Crosby refused to do, especially 131
as subsequent developments have shown that it was a herculean task they were asking him to undertake upon a contingent fee.

In the next place, we say that the highest Courts of this State and the Federal Courts of the United States have never heretofore cast any reflection upon the failure of a party to bring a suit for the maintenance of their rights when such suit was brought, as this one was, within

132 the period allowed by the Statute of Limitations; but on the contrary, the Courts have always held that no delay, short of the statutory time, in bringing a suit shall in anywise reflect upon its credibility.

Wherefore, it is respectfully submitted to this Honorable Court that the origin of the cohabitation between Blasius and Josephine was not meretricious or illicit, and that the reputation in regard to such cohabitation was not divided among the people who knew of its existence.

133 Therefore, there arises from the cohabitation of Blasius and Josephine, as established by the twenty-two witnessess of the complainants, together with their documentary evidence upon that subject, the most violent presumption known to law, namely, that, from such ~~repeated~~ reputed cohabitation as husband and wife, they were married.

Cross *vs.* Cross, 3 Paige, 139.
Montgomery *vs.* Montgomery, 3 Barb. Ch.,
134 322.
Caujollie *vs.* Ferrie, 33 N. Y., 90.
Caujollie *vs.* Ferrie, 1 Barb. Ch., 375, 377.

And if it be true that the origin of the cohabitation between Blasius and Josephine was not illicit, or if it be true that the reputation in regard to the nature and character of their cohabitation be not reasonably divided, then in either case the evidence introduced by the defend-
135 ants is wholly insufficient to overcome the presumption of marriage which arises from the facts established by the proofs of the complainants herein, and the judgment of the Court below must be reversed, as shown by the opinion of Judge Wheeler in this case and by the cases cited upon the brief of the appellants herein.

Your petitioners further submit to any conditions which may be imposed by this Honorable Court in the granting of this petition for rehearing, and further, they pray for

such other and further relief as in equity and good conscience they may be entitled to. 136

JOHN H. V. ARNOLD,
Of Counsel for Leonora A. Arnold and
her Husband Thomas E. Arnold,
Appellants.

I, John H. V. Arnold, one of the counselors of the Circuit Court of the United States for the Second Judicial Circuit, do hereby certifiy that in my opinion the 137
grounds stated in the above and foregoing petition for rehearing of Leonora A. Arnold and her husband, Thomas E. Arnold, appellants, in the cause in equity brought by them against Charles A. Chesebrough and another, individually and as trustees, etc., and wherein the decree of the Circuit Court of the United States for the Eastern District of New York has been affirmed in this Court as therein stated, are meritorious and sufficient, and that said petition for rehearing is well founded in point of law.

138

Dated New York, November, 8, 1893.

JOHN H. V. ARNOLD.

Indorsed:

Petition for rehearing filed November 13, 1893.

139

140 CIRCUIT COURT OF APPEALS OF THE UNITED STATES,

FOR THE SECOND JUDICIAL CIRCUIT.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and
141 Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

This Court having rendered its opinion herein October
142 24, 1893, that the final decree of the Circuit Court of the United States for the Eastern District of New York, filed December 21, 1891, should be affirmed with costs upon the appeal of the complainants herein, and the said complainants and appellants, by their counsel, John H. V. Arnold, having, on the 13th day of November, 1893, filed a petition for a re-hearing of said appeal, and this Court having rendered its opinion on the 5th day of December, 1893, denying said petition for a re-hearing; now, it is hereby

143 Ordered, That the petition of the complainants and appellants herein, filed November 13, 1893, praying for a rehearing of the appeal herein, be and the same hereby is denied.

Dated New York, December 7, 1893.

W. J. W.
N. S.

To HENRY W. RAWCLIFFE, Esq.,
Solicitor for Complainants and Appellants,
No. 206 Broadway, N. Y.

SIR—Take notice that I shall ask for the granting of 144
the annexed order at a Term of this Court to be held in the Post Office Building, New York, on Monday, December 11, 1893, at the opening of the Court, or as soon thereafter as counsel can be heard.

Dated New York, December 6, 1893.

Yours, etc.,
WALTER S. LOGAN,
Solicitor for Defendants and Appellees, 145
No. 58 William Street,
New York City.

Indorsed :

Order denying petition for re-hearing, and notice filed December 12th, 1893.

U. S. CIRCUIT COURT OF APPEALS, 146

SECOND CIRCUIT.

LEONORA A. ARNOLD et al.,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH et al.,
Defendants and Appellees. 147

Upon the annexed affidavit, and upon the record and all proceedings had in the above entitled action, let the defendants and appellees show cause at a term of this Court to be held at its rooms in the Post Office Building in the City of New York on the 11th day of December, 1893, at 10.30 o'clock in the forenoon of that day, why the issuing of any mandate in this action to the Court from which the appeal was taken should not be stayed for

148 sixty days, or why such other or further order or relief in the premises should not be granted as to the Court may seem just, and in the mean time, and until the hearing and decision of this application, let the issuing of any mandate herein be stayed.

Dated New York, December 6, 1893.

WM. J. WALLACE.

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149 U. S. CIRCUIT COURT OF APPEALS,

SECOND JUDICIAL CIRCUIT.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

150 CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

151

State, City and County of New York, *ss:*

Henry A. Raweliffe, being duly sworn, says: That he is the solicitor for the complainants and appellants in the above entitled action, and has been such at all times during the pendency of the same in this Court.

Deponent further says that this case was argued in this Court on the 3d and 4th days of May, 1893, before Judges Wallace, Wheeler and Shipman; that thereafter, and on

the 24th day of October, 1893, two opinions of this Court were handed down, one by Chief Justice Wallace and concurred in by Justice Shipman, in favor of the affirmance of the decree appealed from herein, and one by Judge Wheeler in favor of a reversal of said decree and the entering of a decree in favor of these complainants and appellants. 152

That thereafter, and on the 13th day of November, 1893, a petition by said complainants and appellants for a re-hearing of said appeal was duly presented to and filed with this Court. 153

That thereafter, and on the 5th day of December, 1893, said petition for a re-hearing was denied.

That no order that a mandate issue to the Court below from this Court has been entered or granted; neither has any mandate been issued from this Court to the Court below from which this appeal was taken; and deponent desires that the issuing of any mandate from this Court to the Court below, or the granting of any order for such mandate, be stayed, for the following reasons, namely: 154

That deponent, after consultation with said complainants and appellants, and on their behalf, desires to make application to this Court at the earliest possible date for its certificate, certifying to the Supreme Court of the United States whether or not the legal evidence in this case upon both sides does not establish a marriage between the father and mother of the complainant Leonora A. Arnold; and also as to whether or not the record of the suit of Rachael Cregier against George M. Chesebrough was competent evident in this case for the purpose of disproving such marriage; and also as to whether or not the testimony of the defendants' witnesses William T. Delaney, Alexander Vincent, William E. Peterson, Samuel Hemple, George W. Smith, Alice Unger, Emma Ryder, Samuel E. Ryan, Catherine Speight, Jonas Holzwasser, Blaise Ryer, Mary E. Haley, Maria Hegeman, Amelia R. Moore, Martin Brill, Martha M. Bowers, Mary Roose, Arminius 155

Aikin, Jeremiah V. Spader, Margaret G. Spader, Frederick A. Putnam, Thomas W. Bollas, Henry Hill, John D. Clark, Francis N. Drew and James McPyke is competent evidence to disprove such marriage; and also because deponent, on behalf of said complainants and appellants, desires, in the event of the denial of such application on behalf of said complainants and appellants for such certificate, to apply to the said Supreme Court of the United States for an order or writ of certiorari requiring the whole record herein to be sent up to it for its consideration and certified to it for its review and determination, pursuant to section 6 of the Act of Congress approved March 3, 1891, for the reason that in the opinion of this deponent, who is a counselor of this Court, grave questions of public interest upon the subject of marriage are involved in this case.

Deponent further says that this application is not made for the purpose of delaying any proceedings in this case, but is made in good faith, and said complainants and appellants herewith submit to any conditions which may be imposed by this Honorable Court in the granting of this application.

Deponent further says, that as it was doubtful, under said Act of Congress of 1891 and the Acts of Congress in existence prior to the taking effect of said Act of 1891 whether or not said complainants and appellants should ~~appeal~~ appeals to this Court or directly to the Supreme Court of the United States, in order to preserve all their rights and equities herein, an appeal was taken in this case to the United States Supreme Court from the final decree entered herein in the office of the Clerk of the Circuit Court of the United States for the Eastern District of New York, which said appeal was taken on or about the 16th day of December, 1892, and the record on said appeal was thereafter and on the first day of April, 1893, duly filed in the office of the Clerk of the Supreme Court of the United States, and said appeal still remains pending and undetermined.

Deponent therefore asks that, in order that all the rights 160
and equities of the complainants and appellants in this case may be fully protected and preserved, that the issuing of any mandate herein made be stayed until such time as this case may be duly brought into said Supreme Court of the United States, either by way of certification from this Court, or by writ of certiorari from said Supreme Court of the United States; and your deponent will ever pray for such other and further relief as in equity and good conscience said complainants and appellants may be entitled to. 161

HENRY ALONZO RAWCLIFFE.

Sworn to before me
December 6, 1893.

[SEAL.] JOS. F. ARNOLD,
Notary Public,
N. Y. Co.

Indorsed:

Affidavit and order to show cause. Service admitted 6th day of December, 1893. Walter S. Logan, solc. for 162
defendant and appellee, Chesebrough; Wm. Almon Wolfe, solc. for defendant and appellee Lounsbury.

Filed January 8th, 1894.

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband, Complainants and Appellants, 163

vs.

CHARLES A. CHESEBROUGH et al., Defendants and Appellees.

Upon the annexed affidavit of Henry A. Rawcliffe, verified December 8, 1893, and upon the motion hereto an-

nexed, and the papers upon which the same is based, let the defendants and appellees show cause in the United States Circuit Court of Appeals for the Second Circuit, on the 11th day of December, 1893, at 10.30 o'clock in the forenoon of that day, why said motion should not be granted, and why such other or further relief in the premises as to the Court may seem just and equitable should not be granted; and sufficient reason therefor appearing, service of this order and of the annexed affidavit and motion upon solicitors for defendants and appellees on or before the 8th day of December, 1893, shall be deemed sufficient notice of this application.

Dated New York, December 8, 1893.

N. SHIPMAN,
Circuit Judge.

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

LEONORA A. ARNOLD et al.,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH et al.,
Defendants and Appellees.

And now come the complainants and appellants and move upon the affidavit of Henry A. Rawcliffe, hereto annexed, that this Circuit Court of Appeals certify to the Supreme Court of the United States the following questions and propositions of law, concerning which it was stated that it desires the instruction of this Court for its proper decision:

1. Whether or not the open and public living together and cohabitation as husband and wife of the parents of the complainant Leonora A. Arnold for a period of four and a half years creates in law a presumption that they were married. 168

2. If such living together and cohabitation for such period of time does create a presumption of marriage, is the testimony of witnesses who had no knowledge of such living together or of such cohabitation, that during that period of time the father of said complainant was known to them only as a single man, competent evidence for the purpose of upsetting such presumption. 169

3. If such living together and cohabitation for such period of time creates such a presumption of marriage, is the judgment roll in the suit brought by Rachel Cregier, the grandmother of said complainant, against the father of said complainant, to recover damages for an alleged seduction of the mother of said complainant by the said father previous to or during the time of such living together and cohabitation competent evidence to offset such presumption or for the purpose of contradicting the declarations of said grandmother that the father and mother of said complainant had declared to her, in her presence, that they were married. 170

4. Whether or not the declarations of the father of said complainant, after a separation from the mother of said complainant, to the effect that he was a single man, or unmarried, is competent evidence against such presumption. 171

5. Assuming that the relations between the said parents of this complainant were secret and illicit for a period of six months or so prior to the commencement of the open and public cohabitation of them together as husband and wife, whether or not such open and public cohabitation of them as husband and wife, for a period of four and a half years thereafter does not establish in law a presumption of a change of such relations from an illicit to a matrimonial character.

172 6. Whether or not the laws of the State of Maryland, prohibiting a marriage within that State without a license first had and obtained, and imposing a penalty for the solemnization of such marriage in the absence of such license, are valid; and whether or not a marriage solemnized within that State without such license is not valid at common law, especially when the parties to it are citizens of and domiciled in the State of New York.

HENRY A. RAWCLIFFE,
173 Solicitor for Complainants and Appellants,
Office and Post-office address,
No. 206 Broadway, New York, N. Y.

U. S. CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

174 LEONORA A. ARNOLD et al.

vs.

CHARLES A. CHESEBROUGH et al.

STATE OF NEW YORK,
Southern District of New York, } *ss.:*

175 Henry A. Rawcliffe, being duly sworn, says that he is the solicitor for the complainants and appellants in the above-entitled action.

That this Court handed down two opinions in this case on the 24th day of October, 1893, one by Chief Justice Wallace, concurred in by Justice Shipman, in favor of the affirmance of the decree appealed from herein; and one by Judge Wheeler, in favor of a reversal of said decree and the entering of a decree in favor of these complainants

and appellants in the Court, from which this appeal was 176
taken, as prayed for in the bill of complaint herein.

That as appears from said opinions, it is solely a question of law as to whether or not the legal evidence in this case on behalf of said complainants and appellants raises a presumption of marriage at common law at some time during their cohabitation as husband and wife, and as to whether or not the evidence of the defendants and appellees in this case overcame such presumption, if any, established by the evidence of the complainants and ap- 177
pellants.

That as appears from said opinion of Chief Justice Wallace, the majority of this Court held that the evidence of said complainants established a presumption of marriage of the parents of the complainant Leonora A. Arnold, but that such presumption of marriage was overcome by the evidence of the defendants to the effect that it was reputed among divers persons, a large number of whom had no knowledge of such cohabitation, that the father of said 178
complainant was reputed among them to be a single and married man; and also by the fact that the mother of said complainant's mother had, after the final separation of the parents of said complainant, commenced and prosecuted a judgment in an action against said complainant's father, for an alleged seduction by him of the mother of said complainant prior to and during the time of such cohabitation. Also that the evidence of the defendants showed that the origin of such cohabitation was illicit, and that the evidence of the complainants did not show that the character 179
of such cohabitation had been thereafter changed from an illicit to a matrimonial one.

Deponent further says that within the principles of law decided in the case of Eisenlord *vs.* Clum, reported in 126 N. Y., 552, the judgment-roll in said seduction suit of Rachel Cregier against George M. Chesebrough, is incompetent for the purpose of showing that the cohabitation between Blasius and Josephine was not matrimonial in its character, or that it was illicit in its origin, and is also in-

180 competent evidence for the purpose of showing that Blasius and Josephine were not married.

Also that within the principles of law decided by said Court of Appeals in the case of Badger *vs.* Badger, reported in the 88th N. Y., 552; case of Clayton *vs.* Wardell, 4 N. Y., 230; Vincent's Appeal, 60 Penn. St., 228; Lyle *vs.* Elwood, L. R. 19 Eng. Cases, 98; the evidence of those persons who did not have personal knowledge of such cohabitation was incompetent evidence for the purpose of show-
181 ing that it was not matrimonial.

Also, that the declarations of the father of said complainant after his separation from her mother was incompetent evidence for the purpose of showing that such cohabitation was not matrimonial within the principles of law decided in the cases of Van Tuyl *vs.* Van Tuyl, 57 Barb., 25; Clayton *vs.* Wardell, 4 N. Y., 230; Matter of Taylor, 9 Paige Ch., 611; Jewell *vs.* Jewell, 1 How., U. S., 219.

182 Also, within the principles of law laid down in the cases of

Hyde *vs.* Hyde, 3 Bradford's Reports, 518 and cases therein cited.
Patrickson *vs.* Patrickson, 12 Jur. N. S., 30.
Fenton *vs.* Reed, 4 Johnson, 52.
Jackson *vs.* Claw, 18 Johnson, 347.
Rose *vs.* Clarke, 8 Paige Ch., 573.
Caujollie *vs.* Ferrie, 23 N. Y., 90.
Betsinger *vs.* Chapman, 88 N. Y., 487.
183 Haynes *vs.* McDermott, 91 N. Y., 451; same case, 82 N. Y., 41.
Gall *vs.* Gall, 114 N. Y., 109.
Breadalbane Case, Eng. Law Repts., Sec. App. Case, Vol. I., p. 182.
Dethoren *vs.* Attorney General, Law Reports and 1 Appeal Cases, 686.
Piers *vs.* Piers, 2 H. L., 331.
Campbell *vs.* Campbell, 1 Law Repts., H. L., Sec. App., 182.

Assuming that the cohabitation of the parents of the complainant was illicit in its origin, still the fact that thereafter they openly, publicly and continuously cohabited together as husband and wife for a period of four and a half years, did create a presumption in law that the character of such cohabitation was thereby changed from an illicit to a matrimonial one. 184

Deponent further says that the questions involved in this case are not ones of fact, but are questions of law as to whether or not, within the principles of law laid down, in the cases above cited and numerous other cases cited upon complainants' brief on appeal, the conceded facts in this case establish a presumption of marriage of the parents of said complainant. 185

Deponent further says that the questions as to whether or not the principles of law laid down in the above-mentioned cases are correct or not as tending to establish or disprove a marriage at common law, are of great public interest, not only as to cases arising where the parties to such marriage are domiciled in the State of New York, but in every State of the Union; and that as the correctness and justness of the principles of law decided by these cases seems to be disputed in the prevailing opinion of this Court, it is most respectfully submitted to this Honorable Court that it is for the interest of the general public, as well as of the parties to this action, that the same should be finally decided and passed upon by the Supreme Court of the United States. 186

Deponent further says that there is not sufficient time in which to give the regular four days' notice of this application, and, therefore, he asks for an order to show cause herein, for which no previous application has been made. 187

HENRY ALONZO RAWCLIFFE.

Sworn to before me,
December 8, 1893.

JOS. F. ARNOLD,
[SEAL.] Notary Public,
N. Y. Co.

188 U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

LEONORA A. ARNOLD et al.

vs.

CHARLES A. CHESEBROUGH et al.

Affidavit of service on person in charge.

189

City and County of New York, *ss.:*

Edward J. Gegan, being duly sworn, says: That he is of the age of 19 years and upward; that on the 8th day of December, 1893, between the hours of 4 P. M. and 5 P. M., he served a copy of the annexed order to show cause on W. Almon Wolf, the attorney for the defendant Lounsbury in the above-entitled action, at his office, No. 59 Liberty street, in the City of New York, by delivering a copy
190 of the same to and leaving the same with a person in charge of said office, said attorney being absent therefrom at the time of said service.

EDWARD J. GEGAN.

Sworn to before me, this 8th day of December, 1893.

JOS. F. ARNOLD,
[SEAL.] Notary Public,
N. Y. Co.

191

Indorsed:

Order to show cause, affidavit and motion for certificate of service admitted 8th day of December, 1893.

WALTER S. LOGAN,
Solicitor for Defendant and Appellee Chesebrough.

Filed January 8, 1894.

At a Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court-room in the Post-office Building, New York City, on the 11th day of December, 1893. 192

Present—Hon. WILLIAM J. WALLACE, NATHANIEL SHIPMAN, } *Circuit Judges.*

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband, Complainants and Appellants, 193

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased, Defendants and Appellees. 194

The complainants and appellants having moved this Court upon order to show cause dated December 8, 1893, and statement of motion thereto annexed, and affidavit of Henry A. Rawcliffe, verified December 8, 1893, for an 195 order that this Court certify to the Supreme Court of the United States various questions and propositions for the instruction of this Court, as set forth in said statement of motion, and for other or further relief in the premises as to this Court might seem just and equitable. Now, on reading and filing said order to show cause, statement of motion, said affidavit, and after hearing counsel for complainants and appellants for the motion, and counsel for the defendants and appellees in opposition; now, on mo-

196 tion of Walter S. Logan, solicitor for defendants and appellees, it is

Ordered, that the said motion be and the same hereby is wholly denied.

W. J. W.
N. S.

Indorsed:

Order denying motion for certificate. Filed December
197 12, 1893.

At a Term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court-room in the Post-office Building, New York City, on the 11th day of December, 1893.

Present—Hon. WILLIAM J. WALLACE, NATHANIEL SHIPMAN, } *Circuit Judges.*
198

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough; and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased,
199 Defendants and Appellees.

The complainants and appellants having moved, upon order to show cause dated December 6, 1893, and the af-

fidavit of Henry A. Rawcliffe, verified December 6, 1893, 200
for a stay of any mandate herein for sixty days and for such other or further relief in the premises as to this Court might seem just; now, upon reading and filing said order to show cause, and said affidavit, and after hearing counsel for complainants and appellants for the motion, and counsel for defendants and appellees in opposition, it is hereby

Ordered, that the issue of the mandate herein be stayed for fifty (50) days from the 11th day of December, 1893, the defendants and appellees, however, to have the right 201
to tax their costs of this appeal and to cause the mandate to be completed and made ready for issuing.

W. J. W.
N. S.

Indorsed:

Order granting stay of mandate. Filed December 12, 1893.

202

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of Leonora A. Arnold and Thomas E. Arnold, her husband, for a writ of certiorari directed to the Circuit Court of Appeals, for the Second Circuit, to bring before the Supreme Court the case of

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LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband, Complainants and Appellants,

vs.

CHARLES A. CHESEBOUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough, and ELIZABETH LOUNSBURY, as Executrix of the Last Will and Testament of Stephen R. Lounsbury, deceased, Defendants and Appellees.

The said petitioners respectfully show to this Court as follows:

I.—That your petitioners were, at the time of the commencement of this action, citizens and residents of the State of New Jersey, and the defendants were at that time citizens and residents of the State of New York.

II.—That on the 10th day of November, 1860, one Margaret Chesebrough, a widow, died, leaving her surviving as her only heirs-at-law, her two sons, Blasius M. Chesebrough, the father of the petitioner, Leonora A. Arnold, and Charles A. Chesebrough, one of the defendants in said action.

III.—That upon her decease said Margaret Chesebrough left a last will and testament, which was thereafter duly admitted to probate by the Surrogate of the City and County of New York, on the 26th day of November, 1860 (pages 4 to 8, Pleadings and Orders, vol. 5), in and by which, after making certain specific bequests, she devised the rest, residue and remainder of her estate, real and personal, to her executors and trustees therein named and appointed, to wit, said defendant Charles A. Chesebrough, said Blasius M. Chesebrough and one Stephen R. Lounsbury, in equal one-half parts to be held in trust by them, to collect the rents, issues and profits thereof, and pay one-half thereof to her son Blasius M. Chesebrough during his life, and the other half to her other son Charles A. Chesebrough, and upon the death of either of her said sons to pay and distribute and divide said one-half share and the accumulations thereof to and among the lawful issue of said deceased son; and upon the death of the remaining son to likewise to dispose of the other one-half share, and upon the decease of either son without issue, then to dispose of such one-half share to the surviving son (pages 4 to 8, Pleadings and Orders, vol. 5).

IV.—That thereafter and on about the 4th day of June, 1884, said executor and trustee, Stephen R. Lounsbury, who had duly qualified as such, departed this life, leaving a last will and testament, in and by which he appointed the defendant Elizabeth Lounsbury, his executrix (page 39, Pleadings and Orders, vol. 5).

V.—That thereafter and on the 16th day of April, 1866, said Blasius M. Chesebrough died intestate, leaving the petitioner Leonora A. Arnold him surviving, his sole lawful issue and heir-at-law; and thereupon said petitioner, under and by virtue of said last will and testament of said Margaret Chesebrough, became entitled to have and receive one half of the said residue and remainder of the estate of said Margaret Chesebrough, consisting at the time of the commencement of this action of a large amount of real estate situate in the cities of Brooklyn and New York in said State of New York, valued at upward of two million dollars at that time, and of personal property, and the proceeds of certain real estate sold, amounting to upward of two hundred and forty thousand dollars (pages 104–112, Pleadings and Orders, vol. 5).

VI.—That thereafter and on the 13th day of March, 1886, these petitioners, upon the refusal of the defendant Charles A. Chesebrough, as executor and trustee of said last will and testament of said Margaret A. Chesebrough, and upon the refusal of said Elizabeth Lounsbury, as executrix of the estate of the other trustee Stephen R. Lounsbury, to account for and pay over to her said personal property, and to deliver to her possession of said real estate after demand prior thereto duly made, filed a bill of equity in said cause in the Circuit Court of the United States for the Eastern District of New York, to have it established that your petitioner Leonora A. Arnold was the lawful issue of said Blasius M. Chesebrough and entitled to have and receive from these defendants the property theretofore demanded of them by her as aforesaid.

VII.—That the defendant, Elizabeth Lounsbury, interposed an answer denying any knowledge or information sufficient to form a belief as to the matters alleged in said bill of complaint, and the defendant, Charles A. Chesebrough, interposed his answer in and by which he denied that said Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, were married, and claim-

ing upon that ground that said petitioner, Leonora A. Arnold, was not the lawful issue of said Blasius M. Chesebrough, and entitled to take, have and receive under and by virtue of the terms of said will of said Margaret A. Chesebrough said one-half share, together with its accumulations of the rest, residue and remainder of her estate (page 215, Pleadings and Orders, vol. 5).

VIII.—That thereafter, and on the 24th day of February, 1891, after the taking and printing of a large amount of testimony, said cause came on for final hearing before Hon. E. Henry Lacombe, Circuit Judge, who thereafter, and on the 30th day of June, 1891, filed his decision to the effect that these petitioners had failed to establish that said Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, were married, and dismissing said bill of complaint, **but without costs;** and thereafter, and on the 21st day of December, 1891, a decree in accordance with said decision was duly entered (page vol.).

IX.—That thereafter and on the 3d day of May, 1893, said appeal to said Circuit Court of Appeals came on to be heard before Judges Wallace, Shipman and Wheeler (vol. 10, page 2). And thereafter and on the 24th day day of October, 1893, said Circuit Court of Appeals rendered and filed two opinions (vol. 10, page 4), one written by Chief Judge Wallace and concurred in by Judge Shipman, holding that said petitioners had failed to establish a marriage between the father and mother of said petitioner, Leonora A. Arnold, and for an affirmance, upon that ground, of said decree. The other opinion was written by Judge Wheeler, holding that such a marriage had been established, and for a reversal of said decree, and in favor of awarding to these petitioners the rights sought to be obtained by them in said action; copies of which said opinions are hereto annexed and marked respectively "Exhibits A and B."

X.—That the principal facts established by the evidence in this case as to a marriage between Blasius M. Chesebrough and the mother of your petitioner, Leonora A. Arnold, all of which was uncontradicted except that of the mother, who was contradicted by herself alone, are very briefly as follows:

That in the month of February, 1854, Josephine Cregier (the mother of your petitioner, Leonora A. Arnold), then about sixteen years old, and a Christian girl, who had received a religious and moral training at the hands of her mother, a respectable widow of the name of Rachel Cregier residing at Sixth avenue and Twenty-eighth street in the City of New York, met and formed the acquaintance of Blasius M. Chesebrough, at a high-toned and highly respectable school for instruction in dancing, at No. 16 Bond street in said City of New York, where she was being prepared to enter society (Complainant's Proofs, vol. 2, pages 604 to 606; vol. 3, pages 1175, 1176, 1179, 1183, 1165, 1288, 1289, 1360).

That after about six or seven months of courtship she and Blasius eloped and went to the City of Baltimore, in the State of Maryland, where they both claimed to have been married (Complainant's Proofs, vol. 3. pages 1179–1183).

That a marriage between them was duly solemnized there at this time is proven by the only living party to it; viz., the wife (Complainant's Proofs, page 1387, vol. 3, page 1649, vol. 4).

That thereupon they took up their abode at the Everett House, and from that time forth they continuously, publicly and notoriously lived together as husband and wife until their separation four and a half years thereafter (Complainant's Proofs, vol. 3, page 1183; vol. 1, pages 70–71).

During this cohabitation there were born to them two children, the older since deceased, and the other, the said petitioner, Leonora A. Arnold (Complainant's Proofs,

vol. 3, page 1387; vol. 1, pages 49 and 427; vol. 4, pages 1545 and 1608).

That such cohabitation of the father and mother of your petitioner, Leonora A. Arnold, as husband and wife during such period of time, was well known to the members of both of the families of said petioner's father and mother; and that upon the birth of said petitioner, Blasius' mother sent to them presents, consisting, among other things, of an outfit of infant's wear, etc. (Complainant's Proofs, vol. 2, page 950, and vol. 3, page 1234, fol. 3702; Defendant's Proofs, vol. 2, page 293, fol. 879).

That the birth of said petitioner was at the time duly recorded by the attendant physician with the knowledge and consent of all the parties, and duly registered as required by law, in the Bureau of Vital Statistics for the City and County of New York (Complainant's Proofs, vol. 4, pages 1546 and 1608).

That the birth and death of the first child born to the father and mother of your said petitioner was duly and publicly announced by both its parents.

That this cohabitation was that of husband and wife, and that it was continuous and apparently and reputedly matrimonial, is indisputably established by the admissions and declarations of both parties to it made during that time, and also by the testimony of twenty-two persons who knew of this cohabitation and were acquainted with the parties themselves or with the members of their respective families.

See testimony of

Mrs. Huldah H. Clapp, Complainant's Proofs, vol. 1, p. 65.

Daniel Goff, Complainant's Proofs, vol. 1, p. 210, 248 to 249.

Mrs. Emeline Irving, Complainant's Proofs, vol. 1, p. 381.

Lawrence Harran, Complainant's Proofs, vol. 1, p. 329 and 275.

Mrs. Julia H. Doubleday, Complainant's Proofs, vol. 1, p. 156 and 170.

James M. Marvin, Complainant's Proofs, vol. 1, p. 50.

Hiram Tompkins, Complainant's Proofs, vol. 1, p. 39.

John Tully, Complainant's Proofs, vol. 1, p. 71 and 75.

Mrs. Fannie Post, Complainant's Proofs, vol. 1, p. 7.

Samuel E. Meade, Complainant's Proofs, vol. 1, p. 186, 190, 191 and 204.

Mrs. Maria Van Vleck, Complainant's Proofs, vol. 1, p. 174 to 184.

Peter Staeden, Complainant's Proofs, vol. 1, p. 88–90, 106, 120, 120 to 124 and 151.

Mrs. Robert Franklin, Complainant's Proofs, vol. 1, p. 425.

Mrs. Margaret A. Cregier, Complainant's Proofs, vol. 1, p. 479.

Christian S. Storms, Complainant's Proofs, vol. 2, p. 522.

Mrs. J. Fitzgerald, Complainant's Proofs, vol. 2, p. 949 and 950.

Edwin Wood, Complainant's Proofs, vol. 2, p. 487.

Mrs. Elizabeth Blum, Complainant's Proofs, vol. 3, p. 1526 to 1528.

Wm. S. Kinch, Complainant's Proofs, vol. 3, p. 1382.

Miss Eliza M. Storms, Complainant's Proofs, vol. 3, p. 991.

Mrs. Almira W. Sisson, Complainant's Proofs, vol. 3, p. 1179 to 1183.

Philip B. Segee, Complainant's Proofs, vol. 3, p. 1415.

EXHIBITS.

Certificate of birth of child, Complainant's Proofs, vol. 4, p. 1546 and 1608.

Judgment for board against Blasius M. Chesebrough for himself and family, Complainant's Proofs, vol. 4, p. 1610.

Letters, Complainant's Proofs, vol. 4, p.1621, 1625 to 1648.

Josephine Chesebrough's action for dower, Complainant's Proofs, vol. 4, p. 1689.

Affidavit of Josephine Chesebrough, Complainant's Proofs, vol. 4, p. 1649.

Powers of attorney of Josephine Chesebrough, Complainant's Proofs, vol. 4, p, 1652 and 1623.

Hotel Records, Complainant's Proofs, vol. 4, p. 1539 to 1545.

Release of dower by Mrs. Josephine Chesebrough, Complainant's Proofs, vol. 1, p. 481 and vol. 4, p. 1625.

XI.—The defendant Chesebrough's evidence consisted entirely of the four classes hereinafter mentioned:

First—The testimony of some twenty-six persons, some of whom testified to the effect that they had not heard that Blasius was married, while others said that, after his separation from his wife, they had heard him say that he was not married, or that he would not marry the best woman living.

None of these persons were ever acquainted with Josephine, none of them knew of this cohabitation between her and Blasius during the time it continued, and many of them never knew Blasius and never spoke to him. Such testimony was inadmissible, as has been expressly held by the New York Court of Appeals, in Badger *vs.* Badger, 88 N. Y., 546–554, § 556.

See testimony of—

Jonas Holzwasser, Defendant's Proofs, vol. 1, p. 32.

Blaze Ryer, Defendant's Proofs, vol. 1, p.42.

Mary E. Haley, Defendant's Proofs, vol. 1, p. 45.

Maria Hegeman, Defendant's Proofs, vol. 1. p. 50.

Amelia R. Moore, Defendant's Proofs, vol. 1, p. 54.

Martin Brill, Defendant's Proofs, vol. 1, p. 79.

Oscar Hudson, Defendant's Proofs, vol. 1, p. 86.

Martha M. Bowers, Defendant's Proofs, vol. 1, p. 96.

Mary Roose, Defendant's Proofs, vol. 1, p. 112.

Jeremiah V. Spader, Defendant's Proofs, vol. 1, p. 175.

Margaret G. Spader, Defendant's Proofs, vol. 1, p. 176.

Frederick A. Putnam, Defendant's Proofs, vol. 1, pp. 199, 243.

Thomas W. Bollas, Defendant's Proofs, vol. 1, p. 235.

Harry Hill, Defendant's Proofs, vol. 1, pp. 267, 268.

John D. Clark, Defendant's Proofs, vol. 1, pp. 276, 285, 287, 294.

Francis Nelson Drew, Defendant's Proofs, vol. 1, p. 316.

James McPyke, Defendant's Proofs, vol. 1, p. 358.

John Judge, Defendant's Proofs. vol. 1, p. 377.

William T. Delany, Defendant's Proofs, vol. 2, p. 10.

William G. Peterson, Defendant's Proofs, vol. 2, p. 51.
Samuel Hemple, Defendant's Proofs, vol. 2, p. 69.
George W. Smith, Defendant's Proofs, vol. 2, p. 85.
Alice Unger, Defendant's Proofs, vol. 2, p. 109.
Emma Ryder, Defendant's Proofs, vol. 2, p. 130.
Samuel I. Ryan, Defendant's Proofs, vol. 2, pp. 146, 149, 154.
Catharine Speight, Defendant's Proofs, vol. 2, p. 262.

This evidence was introduced by the defendant for the purpose of showing a divided repute as to this marriage, and was objected to by the complainants upon the three following grounds:

(1) The testimony of persons who had no knowledge of this cohabitation, to the effect that they had never heard of it, could not by any possibility tend to show whether it was meretricious or matrimonial, and consequently of the character held inadmissible in Badger *vs.* Badger, 88 N. Y., 554.

(2) That declarations made by Blasius after this cohabitation had ceased were incompetent to show what its true character was. In other words, if it was matrimonial, he could not, after it had ceased, make it meretricious by saying that it was such.

(3) That after a cohabitation had ceased, and issue from it is living, neither party to it will be allowed to bastardize that issue by saying that it was meretricious and not matrimonial, as it appeared to be.

Second.—Two deeds claimed to have been executed by Blasius seven years after his separation from his wife, and

at a time when each was ignorant of the other's whereabouts, to which deeds Josephene was not a party, which were objected to by the complainants upon the same grounds as last above stated (defendant's proof, vol. 4, pp. 187 and 183, and complainant's proofs, vol. 3, pp. 1253 to 1256, 1387, 1393, and vol. 4, pp. 1718 to 1719. 1725, 1723, 1742, 1743.)

Third.—The judgment roll in an action brought by Josephene's mother against Blasius after their separation, in which she claimed to recover damages against him for the alleged seduction of her daughter, which was also objected to by the complainants upon the ground that as Josephene was not a party to the suit and did not know of it, said suit did not in any way tend to show what was the character of this cohabitation because the parents of neither party to a marriage can divorce them by bringing such a suit (defendants' proof, vol. 2, p. 303.)

Fourth.—Also that one year and six months after the mother of your said petitioner had testified with regard to her marriage with Blasius M. Chesebrough in Baltimore, the defendant Chesebrough suborned her to commit perjury and testified that she was not married to Blasius, but lived with him *as his wife* during this period of time under a promise that he would marry her immediately after his mother's death (pp. 296, 293 and 285; Defendant's Proofs, vol. 2, and Complainants' Proofs, pp. 621 to 627, 676, 677, vol. 2), which testimony these complainants claim, even if true, still showed a marriage valid in law.

The foregoing mentioned evidence constituted all the proofs introduced on behalf of the defendant, Chesebrough, to show, as he claimed, that this cohabitation which had existed for four and a half years between Blasius and Josephene, in the course of which two children were born to them, was not a matrimonial one, as it seemed to be and as they had both declared

it to be, but one which had been entered into under a promise that it should be followed by a marriage after the death of Blasius' mother, and therefore not valid in law.

XII.—That by reason of the fact that said defendant, Charles A. Chesebrough was able to suborn the mother of said petitioner to commit perjury as aforesaid, and testify that she was not married to said Blasius M. Chesebrough, as she had first testified to, but that she had lived with him as his wife under a promise to marry her *de futuro*, said Circuit Court of Appeals, in the written opinion of Judge Wallace, held that her testimony in regard to her marriage having taken place in Baltimore should be disregarded; and also, that her living with him under a promise to marry her *de futuro* did not establish a legal marriage (p. 14, vol. 10).

Judge Wheeler, in his opinion, held that as she had lived with Blasius as his wife, whether it was under a contract of marriage made *per verba de praesenti* or *per verba de futuro*, followed by such cohabitation, still it was in law a valid marriage.

1 Blackstone's Commentaries, 465.
1 Kent's Commentaries, 87.
2 Greenleaf Ev., § 460.

And he further held that the fact that she had been suborned by the defendant to commit perjury did not tend to destroy the effect of her first testimony in regard to the contracting of a marriage, in view of the fact that the taking place of such a marriage was so strongly corroborated by their open, public and continuous cohabitation as husband and wife in the presence of their relatives, friends and acquaintances for a period of four and a half years thereafter, and by the reputed declarations of both herself and of Blasius, during it, that they were husband and wife (pp. 6 and 9, vol. 10).

XIII.—That it is not shown by the evidence in this case that there was any cohabitation whatever between the parents of your petitioner prior to said 18th day of August, 1854, except the testimony of said petitioner's mother, who says that it existed only for a very short time, and that, too, upon a promise that it should be consummated by a marriage ceremony which she says took place at Baltimore, Maryland, immediately preceding their beginning to live together at the Everett House on said date (Complainant's Proofs, vol. 3, p. 1387).

XIV.—That the uncontradicted evidence shows that after the separation of the parents of said petitioner in the fall or winter of 1858-9 the parents of said petitioner never thereafter intermarried with any other person, and did not know of each other's whereabouts or doings until shortly after the death of said Blasius M. Chesebrough, when the mother of said petitioner, Leonora A. Arnold, came from Nashville, Tenn., where she was then living, and endeavored to obtain an enforcement of her rights, as his widow, for her dower in and to a small piece of property which he owned in his own right (Defendant's Proofs, vol. 2, p. 181, 283, 284-303, and Complainant's Proofs, vol. 3, p. 1,254, and vol. 4, pp. 1718, 1719-1725, 1723-1742).

Thereafter she commenced a suit to enforce such dower rights, in the Circuit Court of the United States for the Southern District of New York, which was dismissed by default, without her knowledge, and without the calling of any witnesses, upon the call of the calendar of that Court (Defendant's Proofs, vol. 2, pp. 300 to 302, and Complainant's Proofs, vol. 4, pp. 1689 to 1697).

XV.—The questions of law with regard to the proving of a marriage involved in this case are substantially as follows:

1. Whether or not the proof of such a marriage, by the direct testimony of one of the parties to it, when corrobo-

rated by the acts and declarations of herself and the other party to it during the time of the cohabitation immediately following it, and by the undisputed evidence of a large number of witnesses that they openly, publicly and continuously cohabited together as husband and wife for a period of four and a half years, and bore issue during that time, can be destroyed by the testimony of such party after the death of the other, to the effect that such marriage did not take place, and that such cohabitation, although continuous, and openly and publicly and apparently matrimonial, was really had under a secret agreement that a marriage should not take place until the happening of some future event.

2. Whether or not a cohabitation under a promise that a ceremonial marriage should be performed after the happening of some future event, where an open, public and continuous cohabitation has immediately followed such promise and is had after the happening of such future event, upon the faith and strength thereof, and issue born is the result of such cohabitation, does not establish a marriage valid at common law in at least one of the different States in which the parties cohabited as husband and wife (as held by Judge Wheeler, following Blackstone, Kent, Greenleaf and other authorities).

3 Assuming that the intercourse between the parties to the marriage was secretly illicit for a short period of time, whether or not undisputed evidence showing that immediately after this commencement they openly, publicly and continuously cohabited together as husband and wife for a period of four years and a-half thereafter, during which time two children were born of it, does not establish a marriage.

4. Whether or not, after the cohabitation between the parties has ceased, and issue has been born, and neither of them ever thereafter intermarries with any other person,

the declarations of either party to the effect that they were not married, is competent to disprove a presumption of marriage arising from such cohabitation.

5. Whether or not a judgment roll in a suit for the seduction of the woman by the man, brought against the man by the mother of the woman, after such cohabitation has ceased, is competent evidence to disprove such a marriage or the presumption thereof arising from such cohabitation.

XVI.—And your petitioners further aver that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons:

1. The Judges of the Circuit Court of Appeals are divided in their opinions (hereto attached) upon the questions of law involved herein as to the construction and application of the rules of evidence in regard to establishing not only a ceremonial marriage, but also one at common law; that is, as to whether or not a promise to marry *de futuro* immediately followed by an apparently matrimonial cohabitation during which issue was born, is not valid as a marriage at common law, which is the same question that this Court was equally divided on in Jewell *vs.* Jewell, 1 Howard, 219.

2. Because the legitimacy of children is involved in the application and construction of these principles of law in regard to the proving and establishing of a marriage.

3. Because the pecuniary rights of the parties hereto involved are large, being upward of several millions of dollars.

4. Because this decision of a majority of the Judges of the Circuit Court of Appeals, as it now stands, is opposed to the decisions of this Court, and of the highest Courts of the State of New York, upon the law of marriage.

Wherefore your petitioners pray that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

LEONORA A. ARNOLD.
THOS. E. ARNOLD.

STATE OF NEW YORK, }
Southern District of New York, } ss.:

Leonora A. Arnold and Thomas E. Arnold, her husband, being duly sworn say, and each for herself and himself say: That deponent has read the foregoing petition, that the same is true to petitioner's knowledge, information and belief; and that deponent's knowledge is derived from the record in this case and from what has taken place in his presence and hearing in the Court in which this action has been heard.

LEONORA A. ARNOLD.
THOS. E. ARNOLD.

Sworn to before me this 26th day }
of February, 1894. }

[SEAL.] JOS. F. ARNOLD,
Notary Public,
N. Y. City and Co.

We hereby certify that we have examined the foregoing petition, and in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

JOSEPH H. CHOATE.
JOHN H. V. ARNOLD.
ROGER FOSTER.

EXHIBIT "A."

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

LEONORA AUGUSTA ARNOLD et al.

vs.

CHARLES A. CHESEBROUGH et al.

Opinion.

WHEELER, *District Judge*—In 1853, Blasius M. Chesebrough, afterwards known as George M., was about thirty-five years old, a son of a widow of large means, and had some property of his own, and was a brother of the defendant, Charles A. Chesebrough; Josephine Cregier was about sixteen years of age and the daughter of a widow; both were born and all lived in the City of New York.

They met at a dancing-school in Bond street, in a building where he had rooms, and she stayed with him in his rooms that night, and lived with him some time afterward before any pretense of marriage. On the 18th of August, 1854, they registered as husband and wife with servant at the Everett House and lived there as such, excepting an absence of a few days, until October 6. They lived together at other hotels and boarding-houses in the same way afterward, and had a carriage and driver and drove about the country somewhat. About September 20, 1855, they drove to Saratoga and registered at a hotel there as husband and wife. A child was prematurely born to them there, which lived but a few days, and was buried in a lot in the cemetery there which he procured. They continued to live together some part of the time at hotels and boarding-houses in the same manner, and were to some extent spoken of as husband

and wife among acquaintances. In the summer of 1857, she went to her mother's, and on October 9 the plaintiff was born there and was their child. Dr. Groves attended her in her confinement, and made return of the birth as required by law, to the registry, with the name of the father as George Chesebrough, and of the mother as Josephine Chesebrough. Her mother, on April 6, 1858, commenced a suit against him for board of himself and family for the six months previous, and on appearance by him recovered judgment for $175. At times when drunk he was very violent, and treated her with great abuse. At sometime in 1858 she suddenly left him and her child and went without his knowledge to Charleston, S. C., and lived with another man there. Dr. Groves commenced suit in December, 1858, against him for attendance upon her when the plaintiff was born and recovered jugdment therein upon default. On February 4, 1859, her mother commenced suit against him for loss of services by her seduction resulting in the birth of the plaintiff and on default and inquest of damages, recovered judgment therein for $2,500. He tried to find her, but died in 1866 without having heard from her.

This suit is brought in behalf of the plaintiff, Leonora Augusta, as his heir. Her mother was present at the examination of witnesses in behalf of the plaintiffs, and testified that in driving about they drove to Baltimore and were married there in 1854, before going to the Everett House to board; afterwards she testified in behalf of the defendant that this was false, and that they were never married, and never understood that they were, but that they agreed to be married when his mother should die.

The Circuit Court found and held that there was no marriage and dismissed the bill. The assignment of errors upon this appeal relates principally to this ruling.

There is no presumption of legitimacy arising from parentage (Blackburn *vs.* Crawford, 3 Wall., 186); but co-

habitation as husband and wife is presumed to be lawful, and legitimacy may be found from it; although if it was illicit in the beginning, the presumption is rebutted until a marriage is shown which would change its character (2 Green. Ev., 162). Jewell *vs.* Jewell, 1 How., 219; Gaines *vs.* New Orleans, 6 Wall., 642.) The mother's testimony that there was a marriage remains in the case, although retracted, and is strongly corroborated by their holding themselves out as husband and wife and living together openly as such at respectable hotels and boarding-houses; and particularly by their recognition of each other as married parents at the time of the death and burial of their first child. She could destroy the force of her testimony so far as it rested upon her truthfulness, but it could not take it away from the support of this corroboration. Her first testimony was consistent with their acts and conduct, but the last was not. The theory of a marriage is further supported by the registry of the birth, for the mother would not become Josephine Chesebrough but by marriage; and it is further strongly supported by the judgments against him for her board as a part of his family, and for the physician's services at the birth of the plaintiff, for he would be liable for neither if she were not his wife. This theory is also somewhat supported by the reputation of a marriage among their relatives, friends and acquaintances; but this is met by proof of reputation to the contrary. The proof of reputation could be done away with by counter proof of the same sort, but proof of a marriage in fact by direct evidence or by acts and conduct of the parties could not be disproved by evidence of reputation to the contrary (1 Green. Ev., s. 107). Mr. Justice Davis, in Gaines *vs.* New Orleans, 6 Wall., 706, said: "Concede it is true that Clark behaved so as to cause his most intimate friends to disbelieve the fact of marriage; that he held himself out to the world as a single man, and by public repute after the time of the alleged marrriage lived with Zulime ostensibly not as his wife; still the case of the complainant is not

weakened." There, as here, the cohabitation began meretriciously, and ended in desertion of the father by the mother, and unlawful cohabitation by her with another man. As marriage is in law but a civil contract between the parties, resting upon their consent, although most often celebrated by religious ceremony, the open public registration of their true names as they would be if married in noted and respectable hotels of the city and in the neighborhood within the city of their former homes, and of the homes of their relatives and friends, and living there in sight of all as if married, would be direct manifestation of the consent upon which the contract would rest, and stronger evidence of its existence than any negative reputation which would necessarily be founded upon mere hearsay. He was dissipated, a frequenter of bawdy houses, and an associate of lewd women; but the mother of the plaintiff appears to have been more and different to him than any other woman. Reputation of his marriage would not be likely to spread to these places, or among these women; and his reputation of being single appears largely from these sources. He made conveyances as a single man, and had a draft of a will made which did not mention her or the plaintiff after she had left him, which goes to show that he then held himself out as single, and administration was applied for on his estate as if he had died single; which goes to show that he was to those making the application then reputed to be single. The record of this suit for seduction seems to be admissible as a declaration by her mother which would tend to show family understanding that there was no marriage; but the judgment was not between such parties as to be at all conclusive of anything. This is all reputation, and not direct proof, and is to be considered in connection with other proof in arriving at what the extent and pervasiveness of the reputation of marriage or no marriage really was. When all this is considered, it shows, as found by the Circuit Court, a reputation too much divided to prove a marriage; it is also too much divided to disprove a marriage, otherwise

shown, if admissible at all for that purpose. Their acts and conduct toward each other corroborating and making plain her testimony that there was a marriage in fact, remain. That the registration of their names as, and calling themselves, husband and wife, was necessary for admission to decent places, and that men and women do so for the purpose of living together at such places, is said in argument, but such use of their true names in such and so many prominent places, in the near vicinity of their relatives and acquaintances, and in the city of their own birth and home, does not seem attributable to that mere purpose, and that no such custom is proved or appears to be sufficiently general to be taken judicial notice of. That men live double lives under different names in the same city, and that men and women register at places as husband and wife under other names for the purpose of living together there temporarily, may be assumed; and that such holding themselves out would have no tendency to prove that they were husband and wife, but rather the contrary. The difference between using false names and true ones wholly changes the effect of the use as proof. And this purpose of living together temporarily does not explain their traveling together under their true names as husband and wife just before the birth of their first child, and burying it as theirs in that relation. Although her first testimony in view of her last would be entitled to no weight alone; and these acts and this conduct might not be sufficient to establish a marriage against her last; her first furnished a key to and is more consistent with all these than the last; and helps out and confirms the proof of a marriage in fact.

That both treated the bonds of matrimony lightly would not show that they did not lightly or otherwise enter into them. The greatest argument against the presumption arising from this holding each other out as husband and wife and cohabitation, is founded upon the supposition that the cohabitation began meretriciously, but this rests

wholly upon her testimony. Take that out and the first cohabitation shown was at the Everett House, where they had registered and lived together openly as husband and wife. But her testimony cannot be taken out, for it is in, and must be considered first and last and all together according to its consistency with itself and other proved facts.

When so considered, that part which states that they were married while away just before going to the Everett House seems more consistent with their going there and living together as they did, there and elsewhere, long enough to bring forth two children in due course, then her subsequent statement that this was false, and that the marriage was to take place when his mother should die.

And to hold that acting as husband with a woman means what it purports, as assuming other capacities does, and legitimate issue, seems more wholesome than to interpret it away by comparison with false pretenses of others in similar aspects, and bastardize issue.

Furthermore, as laid down by Sir William Blackstone, any contract made *per verba de presenti*, and in case of cohabitation *per verba de futuro*, was deemed a valid marriage (1 Comm., 465). This is so laid down by Chancellor Kent, 1 Comm., 87, and by Professor Greenleaf, 2 Ev., § 460.

The Circuit Court for the District of South Carolina so charged the jury in Jewell *vs.* Jewell, 1 How., 219, and the Supreme Court being equally divided, did not reverse this ruling. The testimony of the mother as to the agreement to marry is not retracted, nor contradicted, and is corroborated by the same circumstances as her testimony of the marriage. If this be true, and that be law, the plaintiff is legitimate.

Indorsed:

Opinion filed Oct. 24, 1893.

EXHIBIT "B."

U. S. CIRCUIT COURT OF APPEALS.

ARNOLD et al.,
Appellants,

vs.

CHESEBROUGH et al.,
Appellees.

Opinion.

WALLACE, *Circuit Judge*—The dismissal of the bill of complaint by the decree of the Circuit Court proceeded upon the ground that Leonora A. Arnold, the principal complainant, was not the issue of a marriage between her mother and Blasius M. Chesebrough. The question which this appeal requires us to decide is whether Mrs. Arnold's father and mother were husband and wife. The decision depends upon the effect of direct evidence relative to a ceremonial marriage between the parents and of indirect or presumptive evidence indicating the matrimonial relation arising from their cohabitation and repute, conduct and declarations.

In such actions, the burden of proof is upon the party who asserts the marriage; but the law presumes from considerations of decency and public well-being that every competent couple who ostensibly cohabit as husband and wife, demeaning themselves toward each other as such, and received into society and treated by friends and relatives as being entitled to that status, have been legally married. This presumption is indulged with special cogency when the legitimacy of the offspring is the issue for judgment. A perfect marriage may be constituted by the consent of the parties to live together as husband and wife as well as

by a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the deduction, as well as by direct evidence. But in the absence of direct proof, marriage cannot be proved by cohabitation alone, however long maintained; the evidence must support a matrimonial cohabitation as distinguished from a meretricious one. (Commonwealth *vs.* Stump, 53 Penn. St., 132; Rose *vs.* Clarke, 8 Paige, 573; Cunningham *vs.* Cunningham, 2 Dow's Parl. Rep., 482.) The facts that parties have publicly acknowledged either other as husband and wife, have assumed the marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them. Both cohabitation and reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage. A divided repute, however, is of no efficacy. It must be a general and consistent one to be of value. We have to apply these rules of evidence to a voluminous mass of testimony, much of which is untrustworthy and eliminating from consideration much in the record which is incompetent. We cannot undertake to recapitulate the testimony or analyze it in detail, as it would serve no useful purpose to do so.

The facts in outline are these: Leonora A. Arnold was born in New York City on October, 1857. Her father was Blasius M. Chesebrough, and her mother was Josephine Cregier. The father and mother met at a dancing-school in New York City, where they both resided in 1854, and on the evening of their first meeting she accompanied him to his rooms and remained with him during the night. She was then about 16 years of age and was living with her mother, who kept a boarding-house. He was about 35 years of age, and was an ostentatious, dissolute, lewd, eccentric man, addicted to drink, capricious and extravagant. He had studied law, but becoming enamored of the stage he had devoted himself to theatri-

cal enterprises. He associated generally with low companions. He had inherited some property, but derived the larger part of his income from the allowances made to him by his widowed mother, a woman of wealth, whose children seldom visited her except to obtain money, and who led an isolated life. He had one brother, but seldom met him. Shortly after the episode mentioned Josephine left her mother's house and went to live with him. They lived together at various hotels and boarding-houses in New York City from 1854 to 1858. Whether they lived together continually does not satisfactorily appear, but they certainly lived together the greater part of the time. She went by the name of Chesebrough, and they held themselves out as husband and wife whenever it seemed expedient or desirable to do so; but she passed as his mistress among those of his associates to whose opinion of his respectability he was indifferent. They made occasional journeys, sometimes with his own equipage, to distant parts of the country. In September, 1855, while they were at the United States Hotel at Saratoga Springs, a child was born to them, died at its birth, and was buried at that place. It would seem that they selected this place, after the close of the conventional season, to have the accouchment take place there. When the birth of a second child, Leonora, was expected, they went to live with Mrs. Cregier, Josephine's mother. Leonora was born at Mrs. Cregier's house.

He was frequently intractible, and when in drink was quarrelsome and violent. Apparently she wearied of his caprices and abuse. In 1858 she left him clandestinely, going first to South Carolina, and subsequently to Tennessee and lived, while in these States, with one Jackson, as his wife. Leonora was left in the meantime at the house of Mrs. Cregier. Her father did not support her and she was provided for by Mrs. Cregier, until the latter's death, which took place in 1870. In 1858 Mrs. Cregier sued him for six months' board of himself and family, and obtained

judgment for $175. In 1859 Mrs. Cregier brought suit against him for the seduction of Josephine, claiming in substance that the relations had been illicit while he and Josephine lived together, and that Leonora was the fruit of their unlawful cohabitation. Mrs. Cregier and one of Josephine's sisters were witnesses at the trial of that suit. Blasius did not interpose any defense, and a judgment was obtained against him for $2,500 and subsequently collected.

Mrs. Chesebrough, the mother of Blasius, died in 1860, and he then succeeded to a large property. He died in 1866, having lived as a bachelor since Josephine left him, ignorant of her whereabouts. He left no will. Leonora and Mrs. Cregier attended his funeral. In 1868 Josephine returned for a time to New York. While there, she, with with her mother, consulted counsel with a view of enforcing any rights which could be claimed by them or Leonora against the estate of Blasius. Soon after her grandmother's death Leonora made a visit of a few months to her mother in Tennessee, and then returned to New York. Thereafter she lived part of the time with her relatives, and part of the time supported herself by her own exertions. Between the visit to her mother in 1870 and 1880, she never heard from her mother. In 1879 Leonora married Mr. Arnold, and in the fall of that year, induced by the representations of designing persons who had been conversant with the affairs of Blasius, he began to collect evidence to set on foot the attack which culminated in the present suit.

In 1880 Leonora went to Tennessee to find her mother and secure her assistance and found her. Shortly afterward, Josephine came to New York. Until this time neither of them had taken any legal proceedings founded upon any alleged rights as the wife or daughter of Blasius.

The only record of a ceremonial marriage which appears in the record consists of the testimony of Josephine, the

alleged wife. She testifies as a witness for the complainants, that after she and Blasius had lived together some time they went to Baltimore, Maryland, and were married there by a clergyman, at his house. She could not give his name or residence and stated that no witnesses were present. She made no mention of a marriage certificate, or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place, or the person performing it, or the attending circumstances. It suffices to say of it that it was improbable and incredible. She did testify, however, that while in Baltimore they stopped at Barnum's Hotel. It is in proof that no persons of their name were guests of that hotel. There was no publication of marriage, and no license to marry; and in the absence of a license it would have been a criminal offense on the part of the clergyman to perform the ceremony. At a later stage in the taking of the proofs, she testified as a witness for the defendants, and made a complete retraction of her previous testimony relative to a ceremonial marriage. She then testified that there never was a ceremonial marriage, and that during the time they lived together she never considered or believed herself the wife of Blasius. When asked, however, if anything had been said between them relative to a marriage, she stated that he had promised her that he would marry her when his mother should die, but she gave no details as to the time, occasion or circumstances of such a conversation. Of course, no credit ought to be given to the testimony of a witness who has committed bald perjury. We cannot say whether she testified truthfully in her original or in her subsequent testimony. Certainly, if any of her statements can be accepted as credible, it is only those which it would be against her probable interest or inclination to make. We may believe that on the first occasion when she met Blasius she surrendered her person to him, and that she lived with him for some period of time before the alleged ceremony of marriage, and that she left him clandestinely and lived in the South as the wife of another

man, until after his death. She testified to these facts originally, when she was trying to appear as a semi-respectable woman, and as to them, did not recant in her subsequent testimony; but her testimoney is worthless as to every other material fact which she might suppose would be of benefit to either of the parties.

We must reject as unworthy of credit the direct evidence of marriage. If there was a promise to marry her at some future time, *cum copula*, there was no marriage according to the law of their domicile.

Cheney *vs.* Arnold, 15 N. Y., 345.
Meister *vs.* Moore, 96 U. S., 76.

The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blasius, satisfies us that the relation was a meretricious rather than a lawful one.

As the question is wholly one of facts, we shall content ourselves with a few general observations upon the proofs.

Irrespective of the admissions of Josephine, the testimony satisfies us that the cohabitation was illicit in its origin. This being so, it is presumed to have continued illicit; and all presumptions in favor of the innocence and morality of the parties are repelled. Men sometimes marry their mistresses, but such cases are the exception. After there has been an open illicit commerce they seldom accord to the woman who has forfeited all claims to her own self-respect and to the countenance of her friend the rights of a wife. The ordinary presumption against a subsequent marriage is stronger than usual in this case, because each of the parties regarded the marriage tie with contempt. He was a frequenter of houses of ill-fame. Her notions of propriety are shown by her summary abandonment of her infant child, and becoming the mistress of Jackson.

The reputation of the relation was at best a divided one. It was convenient, and, indeed, for some purposes was necessary, that they should maintain the semblance of a matrimonial relation. If they had not done so, they would not have been received in such hotels and boarding-houses as suited his ambitious tastes. Some of their acquaintances would have ignored them. Tradesmen would have been less indulgent. Even their servants would have treated them with less civility. It would be strange if some of those with whom he came in contact had not been led to believe him to be married. None of his relatives supposed him to be married. His boon companions understood her to be his mistress. Some of her relatives and acquaintances doubtless believed that she was his wife. No one was so near to her, nor so likely to have a better appreciation of the true nature of the cohabitation as her own mother. Mrs. Cregier was a hard-headed, practical woman. What she believed is sufficiently shown by the record of the seduction suit.

Convincing evidence that they were not husband and wife is found in their own conduct. Unless they had so deported themselves that it was notorious that she was only his mistress, there was no reason why he should not have introduced her to his mother as his wife. Neither her education, her manners or her social surroundings stood in the way. There was nothing except her relations with him. Old Mrs. Chesebrough would have rejoiced to know that her son had married a decent woman. As a married man who had finally concluded to change his mode of life, he could have appealed more effectually than before to his mother's bounty.

If Josephine had been his wife, why should he have made a secret of the fact and represented her deliberately to decent people as being only his mistress. Such a significant episode as that detailed by the manager of the Clifton House, at Niagara Falls, where they represented themselves as husband and wife until they quarrelled, but finally ad-

mitted what their true relation was, cannot be explained away upon any theory of his eccentricities. He was not so utterly bereft of manly impulses as to permit her, if she were his wife, to be ejected from the hotel as a mistress, and sent to New York, while he continued to remain there as a guest. He made conveyances of real estate as a single man. He submitted without protest to the making of a judicial record which branded her as a concubine, and his child as a bastard. Her conduct in leaving him without making any claim against him for support, and in making no such claim during his life, or against his estate until fourteen years after his death, proves almost irresistibly that she knew she could not establish such a claim. She knew of his death about the time it took place, must have known as his wife she could secure a comfortable fortune from his estate, and she had consulted astute counsel. We place but little stress upon the circumstances that he did did not recognize Leonora as a legitimate child by any testamentary disposition. We are not satisfied that he knew the contents or the effect of the will which was drawn but not executed. He always acknowledged her paternity, and evinced sometimes some interest in her, and even affection for her. He would not have been unwilling to curtail the inheritance of his brother even in favor of an illegitimate child. Yet there is proof that no single act of his toward Leonora, after her mother left her, to indicate that he regarded her as having any lawful claim upon him.

Mrs. Cregier was a capable and energetic woman. She took the place, after Josephine disappeared, of father and mother to Leonora. She knew how to find plenty of lawyers to take up litigations upon contingent rewards. When Blasius died, and the proofs were fresh of the relation between him and Josephine, the time had come when she could have asserted Leonara's rights, if she had any, with the prospect of securing for her grandchild, and incidentally to herself, the comforts of an ample fortune. But although she and Josephine concerted together, surveyed the ground and

consulted enterprising counsel, no attack was made throughout the four years she lived after the death of Blasius. Her action is unaccountable, except upon the theory that she felt satisfied there was no case sufficiently strong to warrant the attempt. She speaks from the grave, an unsummoned witness, whose testimony is more persuasive than that of a score of persons, who with fragmentary knowledge or confused recollection speak of incidents which took place twenty years before.

It has been observed by the Courts, that the concomitants of those living in illicit intercourse together are often identical with those of married people.

Breadalbane *vs.* Breadalbane, H. L. S., 182.
Goldbeck *vs.* Goldbeck, 18 N. J. Eq., 42.
Barnum *vs.* Barnum, 42 Md., 251.

It is not surprising that to some extent there should have been a repute that Blasius and Josephine were married. It is not strange that Leonora, a motherless child, practically, should have gone by the name of Chesebrough. It is not strange that the infant, who died at the hotel where they had registered and lived as though they married, should be buried as the child of Mr. and Mrs. Chesebrough. In our judgment there is hardly an established fact in the record which is inconsistent with the theory that they held themselves out as husband and wife merely for motives of expediency, while the presumptions from facts well proved, and the considerations arising from most demonstrative conduct, denote that the real relation did not exist.

The decree is affirmed with costs.

Indorsed:

Opinion filed October 24, 1893.

United States Supreme

In the matter of the Petition of

LEONORA A. ARNOLD and THO
E. ARNOLD, her husband,

For a writ of Certiorari, etc.,

TO THE

U. S. CIRCUIT COURT OF APPEA
FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONE
In Support of Application for Writ.

JOSEPH H. CHOATE,
JOHN H. V. ARNOLD,
ROGER FOSTER,
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52 WALL STREET, 206 BROADWAY
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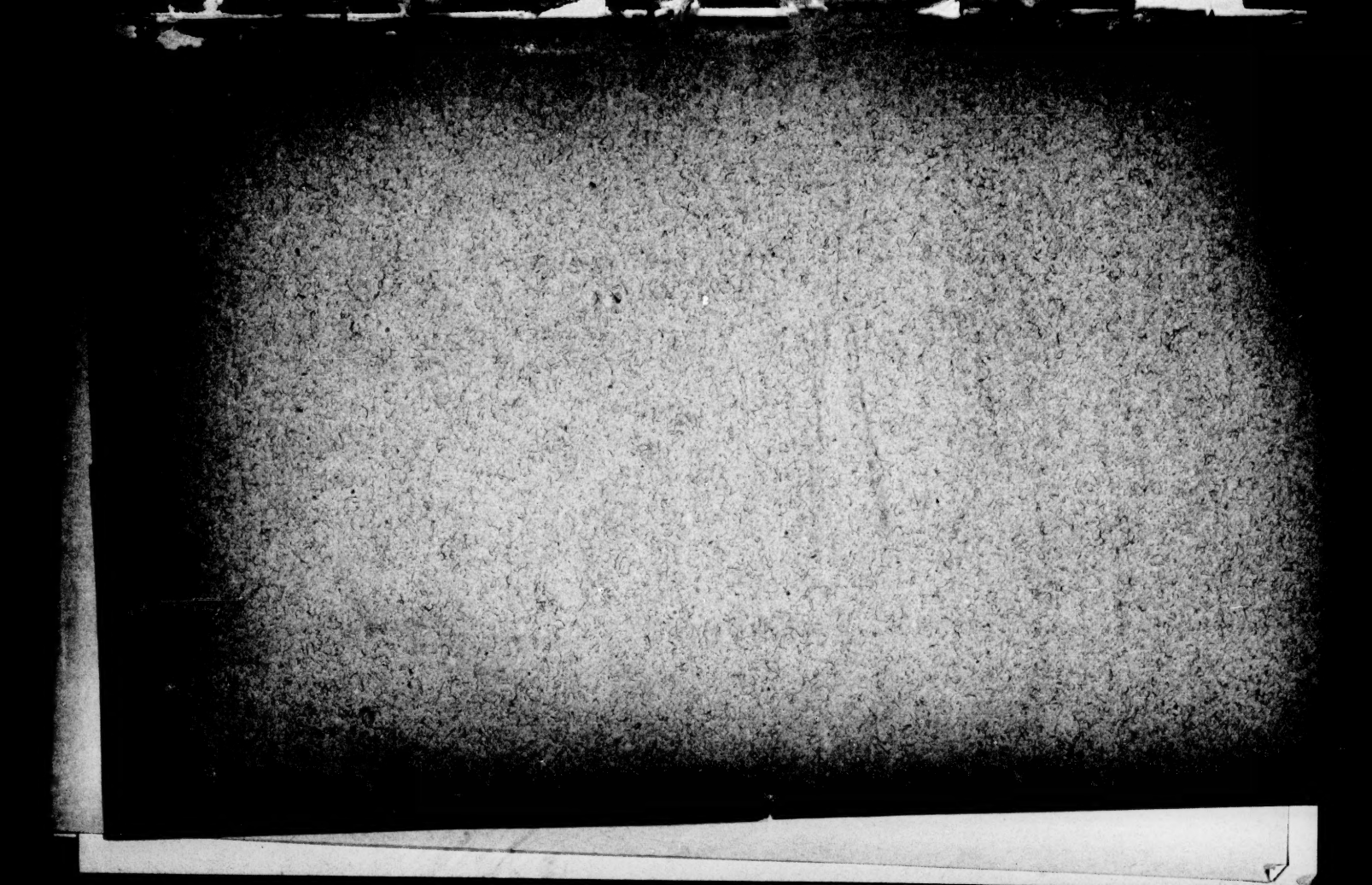
NEW YORK

NEW YORK:
MARTIN B. BROWN, LAW PRINTER AND STATIONER,
Nos. 49 to 57 PARK PLACE.
1894.



Supreme Court of the United States.

In the Matter

of

The Petition of Leonora A. Arnold and Thomas E. Arnold, her husband, for a writ of certiorari.

Brief in Support of Petition.

This is a petition on behalf of the complainants in the case of Leonora A. Arnold and Thomas E. Arnold, her husband, against Charles A. Chesebrough, individually and as executor and trustee under the last will and testament of Margaret Chesebrough; and Elizabeth Lounsbury, as executrix of the last will and testament of Stephen R. Lounsbury, deceased, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to bring before this Court for review, said case.

1. This case was brought in equity to establish that the petitioner Leonora A. Arnold was the lawful issue of Blasius M. Chesebrough, and as such entitled to inherit, have and receive, under the will of Margaret Chesebrough, late of the City of New York, but now deceased, certain property devised and bequeathed in and by said last will and testament of said Margaret Chesebrough to the lawful issue of her son, Blasius M.

Chesebrough, the father of said petitioner, Leonora A. Arnold.

2. The defendant Charles A. Chesebrough was a brother of said petitioner's father, and one of the executors and trustees of said will of Margaret Chesebrough, and the defendant Elizabeth Lounsbury is the executrix of Stephen R. Lounsbury, another executor of said will.

3. In this action these defendants were asked to account for and turn over to said petitioner one-half of the personal property, upward of a quarter of a million dollars worth, which came into their hands as such trustees, and also account for and turn over to said petioner, one-half of the proceeds of all real property belonging to said estate which had been sold and converted into cash, and lastly, to execute good and sufficient deeds and deliver possession to this petitioner of one-half of the real estate still left remaining, which exceeds in value one million of dollars, which passed under said will to them as trustees.

4. The defendant Elizabeth Lounsbury filed a formal answer to the Bill of Complaint, simply denying any knowledge or information sufficient to form a belief as to the truth of its allegations, while the defendant, Charles A. Chesebrough, put in issue the question as to whether Blasius and the mother of said complainant, Leonora A. Arnold, were married, and by an amendment to his answer, which was allowed upon terms, he pleaded the Statute of Limitations.

After the joining of issue, a large amount of testimony was taken, which, however (except in the case of a single witness, who contradicted herself), was not conflicting in any respect; in other words, the evidence in this case presents no conflict or contradiction of testimony in any respect whatever upon any material fact.

Upon this testimony the case was brought on for final hearing before Hon. E. Henry Lacombe, Circuit Judge, when the three following questions were raised:

(*a*) Whether or not the parents of said petitioner, Leonora A. Arnold, were married.

(*b*) If her parents were married, whether or not her rights were not barred by the Statute of Limitations of the State of New York.

(*c*) Whether or not a Court of Equity had jurisdiction of the controversy.

5. Judge Lacombe held that the plaintiff had failed to show that her parents were married, but did not indicate, in his opinion or otherwise, that he passed upon either of the other two points raised, and dismissed the bill of complaint, but WITHOUT COSTS.

6. On the the 24th day of October, 1893, two opinions were handed down by said Circuit Court of Appeals, one written by Judge Wallace, in favor of an affirmance of said decree so appealed from as aforesaid, and the other by Judge Wheeler, in favor of reversal thereof.

Thereafter, and on the 13th day of November, a petition on behalf of said complainants for a rehearing of said case in said Circuit Court of Appeals was filed, and about a month thereafter, and on the 5th day of December, 1893, said petition for a rehearing was denied.

A certificate certifying the questions of law involved in this case to this Court for its decision was duly requested of the Circuit Court of Appeals, and denied; but a stay of the issuing of any mandate herein was granted, to enable these complainants to make this application to this Court for a writ of certiorari.

7. This application is made to this Honorable Court for a writ of certiorari to bring this case up from said Circuit Court of Appeals for review, upon the following grounds:

First—That it is a case of great importance to the complainant Leonora A. Arnold, involving a question of her legitimacy and her rights in and to a large amount of property worth at least several millions of dollars.

Second—That the decision of said Circuit Court of Appeals as handed down in said opinion of Chief Judge Wallace as to what evidence is competent to disprove a marriage, is contrary to the decisions of this Court and to the decisions of the highest Court of the State of New York where the parties to it were domiciled and where said case was tried.

Third—That a question of great public importance is involved upon which uniformity of decision is important, upon which said Circuit Court of Appeals was divided, and upon which this Court was equally divided when the question was last before it, viz., whether or not a cohabitation as man and wife entered into under an agreement that it shall be followed in the future by the performance of a formal ceremony, constitutes a marriage valid at common law.

This Court has announced in the Lau Ow Bew case, 144 U. S., 47, the principle which will guide it in passing upon applications of this nature. The writ of certiorari will issue "where questions of gravity and importance are involved, or in the interest of uniformity of decision."

IRRESPECTIVE OF THE AMOUNT INVOLVED (MORE THAN A MILLION DOLLARS), WHAT QUESTION CAN BE OF GREATER GRAVITY AND HAVE MORE IMPORTANCE, THAN THE LEGITI-

MACY OF A CHILD, INVOLVING THE HONOR OF NOT ONLY HERSELF AND HER MOTHER, BUT OF GENERATIONS OF HER DESCENDANTS? ON WHAT POINT IS IT MORE IMPORTANT THAT THERE SHOULD BE UNIFORMITY OF DECISION THAN AS TO WHAT CONSTITUTES A LEGAL MARRIAGE BETWEEN CITIZENS OF THE UNITED STATES, WHO HAVE LIVED IN DIFFERENT STATES OF THE UNION AS HUSBAND AND WIFE?

Either of these grounds alone should, we submit, be sufficient for the granting of this application.

UNDISPUTED FACTS—

The uncontradicted evidence shows that Blasius M. Chesebrough, when a bachelor about thirty years of age, made the acquaintance of Josephine Cregier, a young lady about sixteen years old, of Christian training and bringing up, and the daughter of a respectable widow who lived with her family at Sixth avenue and Twenty-eighth street in the City of New York. That this meeting of Blasius and Josephine took place at a highly respectable school for instruction in dancing in the City of New York, which they were both attending for instruction and education in that line, and which was then attended by a large number of the children of the first and most respectable families of that city (Complainants' Proofs, vol. 2, pp. 604–606; vol. 3, pp. 1175, 1176, 1179, 1183, 1165, 1288, 1289, 1300; and vol. 1, pp. 413–432, 433).

That after a courtship of about six months, Blasius and Josephine eloped to the City of Baltimore, Maryland, where they claimed upon their return to have been duly married by a clergyman, and duly announced that fact to her parents (Complainants' Proofs, vol. 3, pp. 1179, 1183, 1387 and 991; vol. 4, p. 1649; vol. 1, pp. 88–106).

That thereupon they began life as husband and wife at the Everett House in said city, and continuously

thereafter openly and publicly lived together as husband and wife at various places in said city and in other States for a period of four and a half years, during which time there was born to them, first, a son, who died at childbirth, and secondly, a daughter, the complainant Leonora A. Arnold (Complainants' Proofs, vol. 1, pp. 70, 71, 49, 186, 210, 270, 272, 319, 427; vol. 3, pp. 1183, 1207, 1213, 1221, 1223, to 1225, 1228, 1230 to 1234, 1257, 1258; vol. 4, 1539, 1545, 1608, 1702, 1719 and Defendant's Proofs, vol. 2, 292, 293).

This cohabitation between them as husband and wife, was known to the members of their respective families, and during all of that time they were regarded as husband and wife by their respective families and were visited by them during that time, the mother of Blasius even sending them a complete outfit of infant's underwear, at the time said complainant was born, which had been in her family for a long while and which she highly prized because worn by her own children (Complainants' Proofs, vol. 2, p. 950; vol. 3, pp. 991, 1234, 1390 and Defendant's Proofs, vol. 2, p. 293).

That the birth and death of the first child was duly and publicly announced. That the birth of the second child, said complainant, took place in Josephine's mother's own home, where she and Blasius were then living, and was duly recorded by the attending physician in the Bureau of Vital Statistics for the City of New York, as required by the law of that city (Complainants' Proofs, vol. 4, pp. 1545, 1608, 1725; vol. 3, pp. 1387, 1257, 1189, and vol. 1, pp. 49, 272–273, 100, 426–427).

That this cohabitation of Blasius and Josephine was only terminated by reason of the cruel and inhuman treatment which he, Blasius, in his intoxicated and half-crazy moments, inflicted upon his wife, and not

then, until in a fit of sheer desperation, she left him and went to Charleston, South Carolina, secretly and without his knowledge, in order that she might escape from his cruelties to her (Complainants' Proofs, vol. 3, pp. 1253 to 1256, 1387, 1393, and vol. 4, p. 1610).

That after her flight from him, he bemoaned her departure and sought to obtain her return to him by every possible means, but to no avail (Complainants' Proofs, vol. 4, pp. 1718 to 1719, 1725, 1723, 1742, 1743).

That after their separation, neither of the parents of said complainant ever intermarried with any other person, and upon the death of Blasius, Josephine returned to the City of New York and endeavored to obtain from his brother, this defendant, her rights as widow in and to such real estate as belonged to him at the time of his death (Defendant's Proofs, vol. 2, pp. 181, 283, 284, 303, and Complainants' Proofs, vol. 3, p. 1255; vol. 4, p. 1689; vol. 1, p. 481, and vol. 2, pp. 700, 737, question 1399, and pp. 839 to 841).

That the said complainant Leonora A. Arnold after her marriage to Thomas E. Arnold, then a man of means, brought this action in the Circuit Court of the United States for the Eastern District of New York, to obtain that portion of the property of her grandmother, Margaret Chesebrough, who died in 1860 (the father of said complainant having died in 1866), to which she was entitled under the last will and testament of her said grandmother. (Complainants' Proofs, vol. 3, p. 1105, fol. 3315, and pp. 1111, 1503.)

Said complainant also called as a witness her mother Josephine, who testified in regard to the marriage having taken place in Baltimore, Maryland, at the time of her elopement with Blasius in 1854, as related by the other witnesses called by the complainants (Complainants' Proofs, vol. 3, p. 1387).

One year and a half thereafter the defendant, Chesebrough, for money consideration as appears by her own testimony and that of other witnesses of defendants, suborned Josephine to commit perjury and testify that no marriage took place as she had previously stated, and that she had lived with him during this time as his wife under a promise on his part that he would marry her immediately after his mother's death (Defendant's Proofs, vol. 2, pp. 295, 270 ; and Complainants' Proofs, vol. 2, pp. 621 to 627, 821 to 826, 833 to 836.

Upon the question of law arising from her latter testimony, arose the difference of opinion between the Judges of the Circuit Court of Appeals.

We claim that, whatever part of her testimony is believed, a valid marriage is still established ; and that if her entire testimony be rejected, there is nothing to rebut the presumption of marriage arising from their continuous cohabitation as husband and wife.

Defendants' Evidence.

The defendant Lounsbury put in a formal answer, but did not otherwise defend the suit.

The defendant Chesebrough, to overcome the presumption of marriage arising from this continuous open and apparently and declared-to-be matrimonial cohabitation between Blasius and Josephine, called upward of twenty-six witnesses, none of whom ever knew of it or of Josephine herself, and many of whom had never seen or talked with Blasius, to testify that they had, either known or heard of Blasius in his lifetime, and that they had never heard that he was married, or that he had said to some of them after his separation from his wife that he was not married and would not marry the best woman living (see Petition, p. 9).

These complainants claimed, both before Judge Lacombe and in the Circuit Court of Appeals, that the evidence of these persons did not tend in the slightest degree to show what was the character of this cohabitation, for the reason that they had not known of it and therefore could not state whether they understood it to be matrimonial or otherwise, and these complainants, to sustain their objection to this class of testimony, relied and urged upon both of these Courts the decision of the highest court of the State of New York as reported in the case of Badger *vs.* Badger, 88 N. Y., 552, in which that Court expressly held such evidence to be inadmissible and of no weight whatever, as appears from the following opinion given by them:

"We are thus able to see what the precise question "of fact was. A continuous cohabitation for about "thirty-five years between these parties was established. "It was either meretricious or matrimonial and all the "evidence properly admissible and touching that in- "quiry was such only as tended to solve the doubt.

"The defendants were permitted to prove, under re- "peated objections and exceptions, that Jacob Badger "was reputed to be a bachelor and unmarried. This "proof was given by persons who were his friends and "acquaintances, but who knew nothing of the plaintiff, "were unconscious of her existence, and in total igno- "rance of her cohabitation with the decedent. The "repute thus proven was not the product of the co- "habitation and did not tend to explain it or solve its "character. It could not by any possibility bear upon "it. It was not its shadow, for it cast none into the "locality where those witnesses were. It was the "shadow as a different and distant fact, which in itself "was not ambiguous and needed no explanation to re- "lieve its character of doubt. That the decedent lived "a single life without the presence or appearance of

" wife or daughter at his rooms when boarding with his " sister was a fact properly proved and clearly admiss- " ible. But that among those who thus saw him and " before whom nothing had occurred to raise the ques- " tion, he was reputed to be unmarried, was pure hear- " say, explaining nothing, since there was nothing to be " explained. The life of John Baker in Macdougal " street was ambiguous in the sense that it might " indicate an illicit intercourse or a matrimonial con- " nection. To ascertain which the shadow it cast upon " surrounding society could be examined and studied " usefully for the solution of the doubt. The life of " Jacob Badger, in Jeroloman street, was not ambigu- " ous at all, and needed no help to solve its character. " It is, indeed, said that the purpose was to show a " divided repute, and so contradict the reputation of " marriage, which, to be effective, must be general. " But the general repute proved, and that required to " be shown, does not and cannot go beyond the range " of knowledge of the cohabitation. If, within that " range, there is a division as to the character of the " fact, the divided repute merely continues the ambig- " uity and determines nothing.

" In Clayton *vs.* Wardell (4 N. Y., 230), the divided " repute was of a marriage, among some friends, and a " disreputable connection among others, thus negativ- " ing a general repute of connubial intercourse among " those having knowledge of the cohabitation. In " Commonwealth *vs.* Stump (53 Penn. St., 135), the " reputation shown related to the parties and their " association, and was that they were not married. In " Vincent's Appeal (60 Penn. St., 228), the husband " lived two lives, as here, and his repute as a bachelor " among those who knew him by his true name was " proved, but no question was raised over it, and it was " not allowed to prevail as against the general repute " of marriage in the locality where both parties lived.

" It was treated as utterly ineffective to produce a " divided reputation.

" In Lyle *vs.* Ellwood (1 R., 19 Eng. Case, 98) the " repute was divided, and that of marriage allowed to " prevail, but it was among those cognizant of the " cohabitation and having reference to it as a fact to " be explained.

" We have been able to find no case where such evi- " dence as was here given, upon its admissibility being " challenged by objection, has been held competent. " The evidence of reputation, when admitted, is an " exception to general rules. It should never be " allowed to stray beyond some useful or necessary " purpose. In its application to cases of pedigree it " is justified by difficulties of proof and confined gen- " erally to the family and relatives, whose knowledge " is assumed, and who have spoken before a contro- " versy has arisen. In its application to the fact of " marriage, it is more than mere hearsay. It involves " and is made up of social conduct and recognition, giv- " ing character to an admitted and unconcealed cohab- " itation. But in its application to a man living in " appearance a single life, it adds nothing to that fact; " it creates no further contradiction to an intercourse " carried on elsewhere under the appearance of matri- " mony, and throws no additional light upon it. It " amounts to bare hearsay, and the unsworn declara- " tions of persons having nothing of the facts in con- " troversy. In the present case, twenty-three different " witnesses were allowed to testify to the reputation " of the decedent as a bachelor, not one of whom " before his death had seen or heard of the plaintiff, " or known of her connection with him. We do not " think this evidence was admissible. Its very volume " and frequency indicates the danger it may have " produced upon the mind of the Court, and we can- " not disregard the error."

The Supreme Court of Pennsylvania has also held the same way in a similar case, Nathan Case, 2 Brewster's Rpts., 149.

Upon the question as to the alleged declaration of Blasius, claimed to have been made after this cohabitation had ceased, to the effect that he was not married, these complainants urged upon both of these courts the decision of this Court in one of the celebrated "Gaines" cases, as reported in 6 Wall., 706, where Mr. Justice Davis, delivering the opinion of the Court, spoke as follows :

" Concede it is true that Clarke behaved so as to
" cause his most intimate friends to disbelieve the fact
" of marriage ; that he held himself out to the world
" as a single man, and by public repute at the time of
" the alleged marriage lived with Zulime ostensibly
" not as his wife.

" Still the case of the complainant is not weakened."

To a similar effect are the decisions of the Supreme Courts of Pennsylvania and of New York as reported in Bickens' Appeal, 2 Brewster's Rpts., 202 ; In re Taylor 9, Paige (N. Y.), 611.

These complainants also claim that said Circuit Court of Appeals, contrary to the decisions of the highest Court of the State of New York, held that the judgment roll in an action brought by Josephine's mother against Blasius after their separation, in which she sought to recover damages against him for an alleged seduction of her daughter, tended to show that this cohabitation was not matrimonial.

This suit was not brought until after Blasius and Josephine had separated, and Josephine of course was not a party to it, and had no knowledge of it whatever (Defendant's Proofs, vol. 2, p. 303).

In a case similar to this, entitled "Eisenlord *vs.* Clum," reported in 126 N. Y., 552, the Court of Appeals of the State of New York held that a similar judgment roll which had been introduced in evidence for the same purpose as the one in this case, was incompetent and did not tend to show in any way the character of the cohabitation between the parties, and reversed the judgment for that reason.

That decision is founded upon the decisions of the highest Courts of England, and there are no decisions that we are aware of holding to the contrary. No other evidence was offered by the defendants, except two deeds executed by Blasius years after Josephine had left him.

Thus we see that when we come to take the evidence introduced by the defendant in this case, to weigh it and judge it according to the rules laid down by the decisions of this Court and of the highest Courts of England and of the State of New York, that it really in no way weakens or overcomes that given by the complainants, nor does it tend to throw any light upon the character of this cohabitation, and that the case must be considered entirely upon what the complainants' proofs show.

DEFENDANTS' CONTENTION.—

The defendants' argument practically concedes this, and claims that, although the complainants' proof is sufficient to establish a marriage in an ordinary case, it is not so in this case, because, as they claim, the commencement of this cohabitation was meretricious.

In reply to that we have to say :

First—That the claim that it was meretricious in its commencement is false and unfounded, for not a single particle of evidence to sustain such a claim as that is

to be found anywhere in the case except in the testimony of Josephine herself when called as a witness by this defendant after he had suborned her to give it, and Judge Wheeler shows very clearly and concisely in that part of his opinion to be found at pages 21 and 22 of our petition for this certiorari that that is so:

"The greatest argument against the presumption "arising from this holding each other out as husband "and wife and cohabitation, is founded upon the sup- "position that the cohabitation began meretriciously, "but this rests wholly upon her (Josephine's) testi- "mony. Take that out and the first cohabitation "shown was at the Everett House, where they had "registered and lived together openly as husband and "wife. But her testimony cannot be taken out, for it "is in, and must be considered, first, last and alto- "gether according to its consistency with itself and "other proved facts. When so considered, that part "which states that they were married while away, just "before going to the Everett House, seems more con- "sistent with there going there and living together as "they did there and elsewhere long enough to bring "forth two children in due course, then her subse- "quent statement that this was false, and that the "marriage was to take place when his mother should "die."

The defendant may claim that when called as a witness on behalf of the complainants, that she testified that she lived with Blasius as his wife a short time before the ceremony was performed in Baltimore; but if that statement be taken to be true, then her explanation that she did so under a promise that a ceremony should be at once performed and that he kept that promise by having a ceremony performed in Baltimore, Maryland, as she testified to, should also be regarded as true (Complainants' Proofs, vol. 3, p. 1387).

Secondly, We say that even if the cohabitation was meretricious in its commencement as claimed by the defendant, still, that it was secretly so and unbeknown to the parents of either party and was more of a seduction of Josephine than an illicit cohabitation with her, and that it was immediately followed by an open, continuous and public cohabitation as husband and wife begun at the Everett House, and sufficiently changed in its character at that time to raise a presumption that this illicit commencement was changed by an actual marriage at Baltimore or some other place, into a matrimonial cohabitation.

The Courts of the State of New York and of England have held that a change of cohabitation from a secret one into an open and public one, was sufficient to raise a presumption of marriage, although the secret cohabitation was illicit in its origin.

The Court, speaking upon that subject in the case of Hyde *vs.* Hyde, 3 Bradford, 518, said as follows:

"If they by their conduct and declarations, profess "to be bound by marital ties, and thus exhibit the "continuation of their cohabitation upon a different "footing from what it had been formerly, the conclu- "sion *must* be in favor of a marriage, although there "was no formal ceremony or regular solemnization "of it shown."

The Courts in many other cases have declared that a much less radical change is sufficient to change the nature of a cohabitation from a meretricious to a matrimonial one.

Hyde *vs.* Hyde, 3 Bradford, 518.
Fenton *vs.* Reed, 4 Johnson, 52.
Jackson *vs.* Claw, 18 Johnson, 347.
Rose *vs.* Clarke, 8 Paige Ch., 573.
Caujollie *vs.* Ferrie, 23 N. Y., 90.

Betsinger *vs.* Chapman, 88 N. Y., 487.
Hynes *vs.* McDermott, 91 N. Y., 451; same case, 82 N. Y., 41.
Gall *vs.* Gall, 114 N. Y., 109.
Broadalbane Case, English Law Reports, Sec. App. Case, vol. 1, p. 182.
Dethoren *vs.* Attorney General, Law Reports and 1 Appeal Cases, 686.
Piers *vs.* Piers, 2 H. L., 331.
Campbell *vs.* Campbell, 1 Law Reports, H. L. Sec. App., 182.

NECESSITY OF UNIFORMITY OF DECISION.

Irrespective of the importance of this question to the petitioner and her children, this application for a writ of certiorari is also made upon the ground that a question of law of great public importance is involved in this case, upon which the Circuit Court of Appeals was divided, and that is, assuming the testimony of Josephine when called as a witness for the defendant, to be true, whether or not it does not establish a marriage between she and Blasius valid at common law.

The same question of law was before this Court in the case of Jewell *vs.* Jewell, 1 How., p. 219, but as this Court, as then constituted, was equally divided in opinion upon that question, the Court did not decide it, but reversed case upon other grounds.

Josephine's testimony upon this second examination, is substantially to the effect that when she swore on her examination as a witness for the complainants, that she was married, that that was not true; and upon her cross-examination she proceeds to tell why she thinks it was not true.

First, she says that no religious ceremony was performed in Baltimore, as she first testified to; yet she

says that she was there with Blasius at that time, and that the residence of the clergyman who performed the ceremony as she first testified to, is correctly described as in Baltimore, Md., in an affidavit which she subsequently made, and which was then shown her (Complainants' Proofs, vol. 4, p. 1649, and Defendant's Proofs, pp. 290–287–286, vol. 2).

In the next place, she states that she and Blasius lived together for upward of five years as husband and wife, holding each other out to the world as sustaining that relation, and that their cohabitation was as that of husband and wife, and that during it two children was born to them (Defendant's Proofs, p. 296, vol. 2).

Next she says that she cohabited with him as his wife, because he promised to have a ceremonial marriage performed after the death of his mother; but that he gave no reason whatever for deferring the performance of this ceremonial marriage until the happening of that event (Defendant's Proofs, pp. 295–293, vol. 2).

Next she testifies that she was led to believe that this living with him as his wife constituted a lawful marriage without being followed by a marriage ceremony. (Defendant's Proofs, p. 279, fol. 837, vol. 2.)

The defendant's counsel attempted to show by her that the promise to have a religious ceremony performed after his mother's death was not made until after the cohabitation began, and that therefore it was not a part of the agreement under which that cohabitation was entered into, but she failed in this, for she said that her memory is very poor, and that she was unable to state exactly what the agreement was. (Defendant's Proofs, pp. 295, 270, 308, vol. 2.)

But she does state in substance that they began to live together as husband and wife, and continued it for a period of five years or more, when she left him, solely because of his cruel and inhuman treatment of her; and that she was led to believe that this cohabitation as husband and wife constituted a valid marriage, and that she called and regarded herself as his wife down to the time that the evidence shows that this defendant (for money consideration) induced her to change her opinion about this being a valid marriage, and to testify that no ceremony was performed, and that no actual agreement to be man and wife was entered into. (Defendant's Proofs, vol. 2, pp. 283–285, 291–293, 304, 272–273.)

Now, Judge Wheeler holds in his opinion that this cohabitation between Blasius and Josephine as husband and wife, under these facts and circumstances, constituted a marriage ~~valid~~ at common law; and his opinion is supported by the decisions of the highest Courts of England and of many of the States of this Union.

1 Blackstone's Commentaries, 439.
2 Kent's Commentaries, 87.
In re Taylor, 9 Paige (N. Y.), 611.
Fenton *vs.* Reed, 4 Johnson (N. Y.), 52.
Jackson *vs.* Winne, 7 Wendell (N. Y.), 47.
Starr *vs.* Peck, 1 Hill (N. Y.), 270.
Asken *vs.* Dufree, 30 Ga., 179.
Patton *vs.* Phila., 1 La., 98.
McFarland *vs.* McFarland, 51 Iowa, 570.
Port *vs.* Port, 70 Ill., 484.

Judge Wallace holds to the contrary in his opinion (to be found at pp. 14–15 of vol. 10) and to support his contention cites the case of Cheney *vs.* Arnold, 15 N. Y., 345.

An examination of that case will show that it is not applicable, even in principle, to this case.

That was a case where a man seduced a woman under a promise that a ceremony of marriage should thereafter be performed between them, after the happening of a certain event. Afterward such an event did occur and such ceremonial marriage was subsequently performed. But, in the meantime, and before such ceremonial marriage was performed, a child was born to them; but not during any cohabitation between them as husband and wife, but intermediate the seduction and the performance of the ceremony of marriage.

At that time, under the laws of the State of New York, a child born before a marriage was incapable of inheriting property of its parents as a legitimate offspring.

In that case, no cohabitation followed the making of the promise of marriage, but simply an occasional sexual intercourse, and the cohabitation as husband and wife did not begin until after the performance of the ceremonial marriage. The Court held in that case, in substance, only that a seduction of the woman, not followed by a cohabitation as husband and wife until after the performance of a ceremonial marriage, did not make the child born previously thereto legitimate under the statute of descent.

However, it contains no decision contrary to our views (and has no more weight than the dicta in Starr *vs.* Peck 1 Hill, N. Y., 270), nor to the other authorities cited above, which are in line with the opinion of Chancellor Kent (2 Kent's Commentaries, sec. 89), than whom there is no better authority on the common law in the State of New York, who speaks upon that subject as follows:

"If the contract be made per verba de præsenti and "remains without cohabitation, or if made per verba "de futuro and be followed by consummation, it "amounts to a valid marriage in the absence of all "civil regulations to the contrary, and which the par- "ties (being competent as to age and consent) cannot "dissolve, and it is equally binding as if made in facie "ecclesiæ. There is no recognition of any ecclesias- "tical authority in forming the connection, and it is "considered entirely in the light of a civil contract. "This is the doctrine of the common law, and also of "the canon law, which governed marriages in England "prior to the Marriage Act of 26 Geo. II.; and the "canon law is also the general law throughout Europe "as to marriages, except where it has been altered by "the local municipal law. The only doubt enter- "tained by the common law was, whether cohabitation "was also necessary to give validity to the contract. "It is not necessary that a clergyman should be "present to give validity to the marriage, though it "is, doubtless, a very becoming practice, and suit- "able to the solemnity of the occasion. The consent "of the parties may be declared before a magistrate, "or simply before witnesses, or subsequently con- "fessed or acknowledged, or the marriage may even "be inferred from continual cohabitation, and reputa- "tion as husband and wife, except in cases of civil "actions for adultery or in public prosecutions for "bigamy or adultery, when actual proof of the "marriage is required. Illicit intercourse or concubin- "age will not raise any such legal presumption of "marriage. This facility in forming the matrimonial "contract by the common and ecclesiastical law "exists in those American States where the common "law has not been altered on this point, or remains in "force, as in New York, South Carolina, and Kentucky. "The New York Revised Statutes had, indeed, intro-

" duced and prescribed regulations for the due
" solemnization and proof of marriage. Marriages
" were directed to be solemnized only by a minister
" of the gospel or priest, or by a mayor, recorder or
" alderman of the cities, or a judge of the county
" courts, or a justice of the peace. Marriage, when
" solemnized by a minister, was to be according to the
" forms of his church, and when by a magistrate, with-
" out any particular form, except that the parties must
" solemnly declare that they take each other as husband
" and wife, and there must be at least one witness
" present, besides the minister or magistrate. The
" minister or magistrate was required to ascertain the
" names and residences of the parties, and their compe-
" tency as to age, and the name and residence of the
" witness or witnesses, not exceeding two if more than
" one be present, and to satisfy himself of the identity of
" the parties. It was made a misdemeanor knowingly
" to marry persons when either is under the age of
" legal consent, or under any legal impediment, or
" wants understanding. The minister or magistrate
" was to furnish on request to either party a certifi-
" cate of the marriage, and of the above facts rendering
" it lawful. The certificate was to be filed with the
" city or town clerk where the marriage was had, or
" where either of the parties resided, within six months,
" and a due entry thereof made. These regulations
" were found to be so inconvenient that they had
" scarcely gone into operation when the legal efficacy
" of them was destroyed and the loose doctrine of the
" common law restored by the statute of 20th April,
" 1830, declaring that the solemnization of marriage
" need not be in the manner above prescribed, and that
" all lawful marriages contracted in the manner in use
" before the Revised Statutes should be as valid as if
" the article containing those regulations had not been
" passed."

But this case is far different in principle; for here the cohabitation as husband and wife immediately followed the making of the promise to have such ceremony performed, and especially in view of the fact that the woman was led to believe that it did constitute a valid marriage. We claim that it showed an assent on the part of both parties to take each other as husband and wife from that time forth, upon the further agreement that it should be publicly proclaimed to the world by the performance of a ceremonial marriage after the death of Blasius' mother.

We claim that whether that promise to have the marriage publicly proclaimed to the world in that manner was thereafter kept, or not, is wholly immaterial; and that where a cohabitation as husband and wife is entered into under such a promise, the assent of each of the parties to it to immediately become husband and wife from that time forth, is sufficiently shown to constitute a valid marriage at common law.

This case upon that point is much stronger than the case of Jewell *vs.* Jewell, 1 Howard, 219, in which this Court was equally divided upon the question as to whether or not a promise to marry in the future, followed by cohabitation, sufficiently showed the assent of the parties to consider each other as husband and wife from that time forth to constitute a marriage valid at common law.

The evidence in this case shows that from the day that this cohabitation between Blasius and Josephine began, under this agreement, that he considered her as his wife, and bemoaned her loss after she had left him, and sought to obtain her return by every means within his power, and upon his death-bed refused to make a will disinheriting her and his child (although

earnestly urged by an uncle of his to do so), saying that he was satisfied to leave it as it was, as they would inherit his property without a will (Complainants' Proofs, p. 1528, vol. 3).

Also that Josephine herself regarded it as constituting her the lawful wife of Blasius for more than thirty years and down to the very time when the defendant, according to her own testimony, suborned her to say that she thought otherwise.

That these two parties to this cohabitation regarded it as having been entered into with the assent on the part of each that from that time forth they should be and become husband and wife, is also evidenced by the further fact that neither of them during their lives ever attempted to intermarry with any other person (Complainants' Proofs, vol. 3, p. 1395).

Judge Wallace in his opinion claims that the case of Cheney *vs.* Arnold, *supra*, is binding upon him in this case, and cites the case of Meister *vs.* Moore, 96 U. S., 76, to sustain that claim.

On the other hand, we claim that the learned Judge erred in his application of these cases to this case, for the two following reasons:

(1) The case of Meister *vs.* Moore only attempts to hold that the construction of the statutes of the State of Michigan in regard to the form of solemnization of marriage in that State is to be construed by this Court according to decisions of the Courts of that State.

In that case, the highest Court of the State of Michigan held simply that there was no clause in the statutes of the State of Michigan providing that a marriage valid at common law, but not solemnized

according to the statutes of that State, should be invalid.

In other words, the highest Court of the State of Michigan held that a marriage at common law was not invalid because not solemnized according to the statutes of that State; and this Court held that that construction of the statutes of that State by the Courts of that State was binding upon this Court.

We therefore claim that the case of Meister *vs.* Moore is not applicable to this case, because there was not involved in that case, nor in Cheney *vs.* Arnold, the construction of any statute of the State of New York in regard to marriage.

Cheney *vs.* Arnold has never been cited with approval since it was rendered.

(2) In this case there is involved only the construction of the rules of common law in regard to the private rights of individuals with regard to the contract of marriage at common law; and that this Court has repeatedly held that it does not feel itself bound by the decisions of the highest Court of any State upon the construction of the rules of common law in regard to contracts, whether of marriage, or of commercial matters, or of any other contracts, especially in equity cases; but that it is at liberty to construe the common law of England, so far as adopted by this country, and in so far as it is not abrogated by the statutes of any State, according to its own ideas of right and justice.

Swift *vs.* Tyson, 16 Pet., 1.
R. R. Co. *vs.* Bank, 102 U. S., 14.
Burgess *vs.* Seligman, 107 U. S., 20.

In Chicago *vs.* Robbins, 2 Blatchf., 18, it was said by this Court:

"Where private rights are to be determined by the application of common law rules alone, this Court,

although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

So it was held in the case of Boyce *vs.* Tabb, 18 Wall., 546, that the decisions of the Supreme Court of Louisiana as to the validity in that State of contracts for the sale of slaves would not be followed by the Federal Courts.

In Venice *vs.* Murdock, 92 U. S. 494, this Court said that it would not follow the decisions of State Courts when a State statute was brought before them for decision, where the opinion of the State Court did not present a clear case of the construction of the State statute, but asserted general principles.

In Carroll *vs.* Carroll, 16 How., 275, it was said that the construction placed upon a State statute by the highest Court of that State would not be followed by this Court in a case where the decision did not necessarily involve the construction of the statute.

The decision in Cheeny *vs.* Arnold, *supra*, was made in June, 1857, after the birth of the plaintiff. In such a case the Federal Courts do not follow the State decisions. Consequently, this is a case for the application of a rule where a contract when made is valid by the laws of the State, as then construed by its Court, subsequent decisions altering the construction of those laws will not be followed by the Federal Courts.

Ohio Life Ins. and Trust Co. *vs.* Debolt, 16 How., 416.
Gelpcke, *vs.* Dubuque, 1 Wall., 175.
Anderson *vs.* Santa Anna, 116 U. S., 356.

In Coulamn *vs.* Doull, 133 U. S., 216, it was held that in the construction of a law of Utah providing for an omission by a testator to provide in his will for one of his children, this Court was not bound to follow the decisions of the State Court of California construing a

similar statute from which the one in question was copied.

It will be remembered that the defendants are not purchasers from Cheesbrough, but persons who claim as his heirs at law, and that consequently the equities are in favor of the appellants, not in favor of the appellees.

(3) Even if the marriage contract made *per verba de futuro*, when followed by a cohabitation, does not constitute a marriage by the common law as interpreted by the Courts of New York, yet as the parties lived together publicly as man and wife under such an agreement, in Maryland, Pennsylvania and other States, the legal presumption would be that a marriage valid by the law of those States was entered into between them.

Thus, in Hynes *vs.* McDermott, 91 N. Y., 451 to 458, the New York Court of Appeals said:

"There is no direct evidence of the interchange of "agreements during their stay in Paris. There was "no evidence that they lived together there in the ap- "parent relation of marriage; and assuming that what "occurred between them in Orchard street did not "constitute a valid marriage by the law of this State, "for the reason that the law of England can only be "resorted to to determine the effect of that transaction, "we are nevertheless of the opinion that the jury were "authorized to find that in France the requisite con- "sents were interchanged, and that the parties then "and there became husband wife."

Citing,

The Broadalbane Case, Eng. L. R. 1, Scotch and Divorce Appeals, 182.

De Thoren *vs.* The Attorney General, L. R. 1, App. Cases, 686.

Rose *vs.* Clarke, 8 Paige, 574.

Caujollie *vs.* Ferrie, 23 N. Y., 90.

In a suit by Josephine to obtain dower in land in another State where she had lived with Blasius this decree would not be *res adjudicata*, nor would the New York cases be authority.

PAPERS UPON WHICH THE APPLICATION IS MADE.

This application for a writ of certiorari is based upon a certified copy of the record, as filed with the Clerk of this Court on the appeal taken to it from the Circuit Court of the United States for the Eastern District of New York, and upon a certified copy of the record of all proceedings had in the United States Circuit Court of Appeals for the Second Circuit, from the time that said appeal was taken to that Court from said Circuit Court of the United States for the Eastern District of New York, and to be found in volume 10, as numbered.

These two records contain true copies of all proceedings had in all courts, from the time of the commencement of this action to the present time.

We respectfully ask this Honorable Court to hear this application upon those two records, instead of upon a certified copy from the Circuit Court of Appeals of the record as filed in that Court, for the reasons that it could bring no additional papers or matters than are now before it, and because, on account of its great volume, it would entail upon your complainants for the certification and reprinting of the same, a very large sum of money, which they are unable to pay. Whereas they are now able to and do produce upon this application ten full and complete certified copies of all records, in all courts, from the commencement of this action down to the present time, which they have left remaining from those already printed and certified to.

There is, however, no need of an examination of them, as the uncontradicted evidence, of which we have given a fair summary, presents the few and narrow but important questions of law upon which we rest this application and our appeal.

JOSEPH H. CHOATE,
JOHN H. V. ARNOLD,
ROGER FOSTER,
Of Counsel for Petitioners

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

The answer of Charles A. Chesebrough, defendant, individually and as executor and trustee under the last will and testament of Margaret Chesebrough, deceased, to the petition of Leonora A. Arnold and Thomas E. Arnold, for a writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of

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LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,

Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the last Will and Testament of MARGARET CHESEBROUGH and ELIZABETH LOUNSBURY, as Executrix of the last Will and Testament of STEPHEN R. LOUNSBURY, deceased,

Defendants and Appellees.

The said defendant respectfully shows to this Court as follows:

He denies that Blazius M. Chesebrough was the father of the petioner, Leonora A. Arnold.

He admits that on the 16th day of April, 1866, said Blazius M. Chesebrough died intestate, but denies that he left the petitioner, Leonora A. Arnold, him surviving, his lawful issue and heir-at-law, and he denies that thereupon said petitioner, under and by virtue of the last will and testament of said Margaret Chesebrough, became entitled to have or receive one-half, or any portion of the residue and remainder of the estate of said Margaret Chesebrough; but he alleges that he himself, the said Charles A. Chesebrough, was the only next of kin and heir-at-law of the said Blazius M. Chesebrough upon his death, and that thereupon he, the said Charles A. Chesebrough, under and by virtue of said last will and testament of said Margaret Chesebrough, became entitled to have and receive the one-half of the residue and remainder of the estate of said MargaretChesebrough, of which the said Blazius M.Chesebrough had been entitled to the income before his death.

As to the tenth paragraph of the said petition, this defendant denies that the principal facts established by the evidence in this case as to an alleged marriage between Blazius M. Chesebrough and Josephine Cregier, the alleged mother of this petitioner, Leonora A. Arnold, are truly or correctly set forth in the said tenth paragraph of the petition, and he denies that the same were uncontradicted, except as alleged in said paragraph, but he says there was much contradiction in the testimony as to the facts relating to said alleged marriage, and that the said statement of facts in said tenth paragraph is grossly false, distorted, colored and perverted, and this defendant prays leave to

refer to the record in this case in support of this, his allegation, and for a true statement of the facts relating to such alleged marriage.

As to the eleventh paragraph of the said petition, this defendant denies that the evidence on behalf of him, the said defendant Chesebrough, is correctly stated and set forth in said eleventh paragraph, but he alleges that the statement of this also is grossly false, distorted, colored and perverted, and he likewise prays leave to refer to the record in support of this, his allegation, and for the true and correct statement of such evidence.

As to the twelfth paragraph of said petition, the defendant emphatically and indignantly denies the allegation or insinuation in the said paragraph contained, that he suborned the said alleged mother of this petitioner, Leonora A. Arnold, to commit perjury or to testify that she was not married to said Blazius M. Chesebrough or that she had lived with him as his wife under a promise to marry her *de futuro*, and he likewise denies that it was by reason of any such alleged or insinuated subornation that his Honor, Judge Wallace, held as he did in his written opinion in the Circuit Court of Appeals in said action (see points VI and VII respondent's brief in the case of Arnold vs. Chesebrough, in the United States Circuit Court of Appeals, re-printed in the appendix to the respondent's brief on this application.)

He denies also that there is anything in the testimony or record in this case which shows that the cohabitation of the said Josephine Creiger with the said Blazius M. Cresebrough was under a promise to marry her *de futuro*, or any promise to marry her whatsoever, and he denies that such was

the fact, and alleges that the record and the uncontradicted evidence in the case showed that the said Josephine Cregier first met the said Blazius M. Chesebrough at a dance house in the City of New York, one evening, and that she, freely, voluntarily and contentedly, shared his bed on the floor above, the same night, without any promise of marriage whatsoever, and that whatever intercourse there ever was between the two parties was not only illicit in its inception, but illicit, corrupt and sinful during its whole continuation (Record, Vol. III, fols. 4158 to 4195; Vol. VII, fols. 805 to 928).

He denies also that his Honor, Judge Wheeler, held or stated, intimated or suggested in his opinion, that the said Josephine Cregier had been suborned by the defendant to commit perjury, and he alleges that such statement or insinuation in the said petition, to the effect that his Honor Judge Wheeler, so held, stated, intimated or suggested, is entirely without any basis or foundation whatsoever.

This defendant also denies that the opinions of his Honor, Judge Wallace, and his Honor, Judge Wheeler, are truly or correctly quoted or set forth in the said twelfth paragraph or that they held or stated in their opinion as in the said paragraph alleged or insinuated, and he begs leave to refer to the opinions of the said judges for the true statement of what was held by them respectively.

As to the thirteenth paragraph of the said petition, this defendant denies the allegation thereof "that it is not shown by the evidence in this case that there was any cohabitation whatever between the parents of your petitioner prior to the 18th day

of August, 1854, except the testimony of said petitioner's mother, who said that it existed only for a very short time, and that too upon a promise that it should be consummated by a marriage ceremony, which she says took place in Baltimore, Md., immediatly preceding their living together at the Everett House on said date."

And this defendant says that there is abundant evidence in the testimony of Frederick W. Geissenhaimer and Charles A. Chesebrough and in the record of the seduction suit in the Superior Court of the City of New York to prove that such cohabitation began at an earlier period and was illicit in its origin and all through its continuation (See Point III, page 41, of the Respondent's Brief in the case of Arnold vs. Chesebrough, in the United States Circuit Court of Appeals, reprinted in the Appendix to the Respondent's Brief on this application).

As to the fourteenth paragraph of said petition, this defendant says that it is true that the occasional cohabitation between Blazius M. Chesebrough and Josephine Cregier came to an end about the beginning of the year 1858, when the said Josephine Cregier left New York and became the mistress of a gambler in Charleston, South Carolina, and it is true that neither Blazius M. Chesebrough nor Josephine Cregier ever thereafter intermarried with any other person. Such statement is incomplete, however, unless it is added that both parties thereafter had illicit relations, he with other women and she with other men, and that she continued to live for many years as the open and avowed paramour of a man by the name of Jackson (See Point III, Respondent's Brief, in Circuit Court of Appeals, reprinted as an appendix to the respondent's brief herein, *supra*).

It is true that some fourteen years after the death of said Blazius M. Chesebrough, the said Josephine commenced a certain suit to recover dower, in the Circuit Court of the United States for the Southern District of New York. Testimony was taken in said suit, and a witness, Clarence Buell, examined at great length therein, to prove the marriage between said Josephine and said Blazius; but the witness subsequently confessed that his testimony was perjury, and the suit was abandoned and dismissed. (See Point VI., respondent's former brief, in the Appendix, *supra.*)

Except as herein stated, the allegations in the said fourteenth paragraph of said petition are untrue.

As to the fifteenth paragraph of said petition, this defendant denies that the questions of law with regard to the proving of a marriage involved in this case are truly or correctly set forth in the said fifteenth paragraph, and he prays leave to refer to the record herein and to the brief of his counsel for a true and correct statement of such questions of law.

As to the sixteenth paragraph of said petition, this defendant denies that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the reasons set forth in said sixteenth paragraph or for any other reasons, and in support hereof he prays leave to refer to the record in this case and to the brief of his counsel on this application.

And this defendant further shows to this Court and alleges that the question at issue is purely one

of fact, that there are no important or considerable questions of law involved, that a lis pendens has been filed during the progress of this suit and a large amount of real estate, upon which it is important to make valuable improvements is tied up so that the same cannot be sold, improved or utilized, and that the delay incident to the granting of this application and to an appeal to your Honorable Court will work great and irretrievable hardship and injustice.

Wherefore this defendant and respondent prays that the said petition be dismissed.

Charles A Chesebrough

Walter S. Logan
Solicitor & Counsel for
Respondent Charles A Chesebrough

City and County of New York, }
State of New York, } ss.
Southern District of New York. }

CHARLES A. CHESEBROUGH, the defendant and respondent above named, being duly sworn, deposes and says that he has read the foregoing answer and that the same is true.

Charles A Chesebrough

Sworn to before me this
14th day of March, 1894.

Geo A Baker
Notary Public
N.Y. Co

United States Supreme Court.

In the matter of the Petition of

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,

For a writ of Certiorari, etc.,

TO THE

U. S. CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT,

Charles A. Chesebrough.

WALTER S. LOGAN,

Counsel for Respondent,

Charles A. Chesebrough,

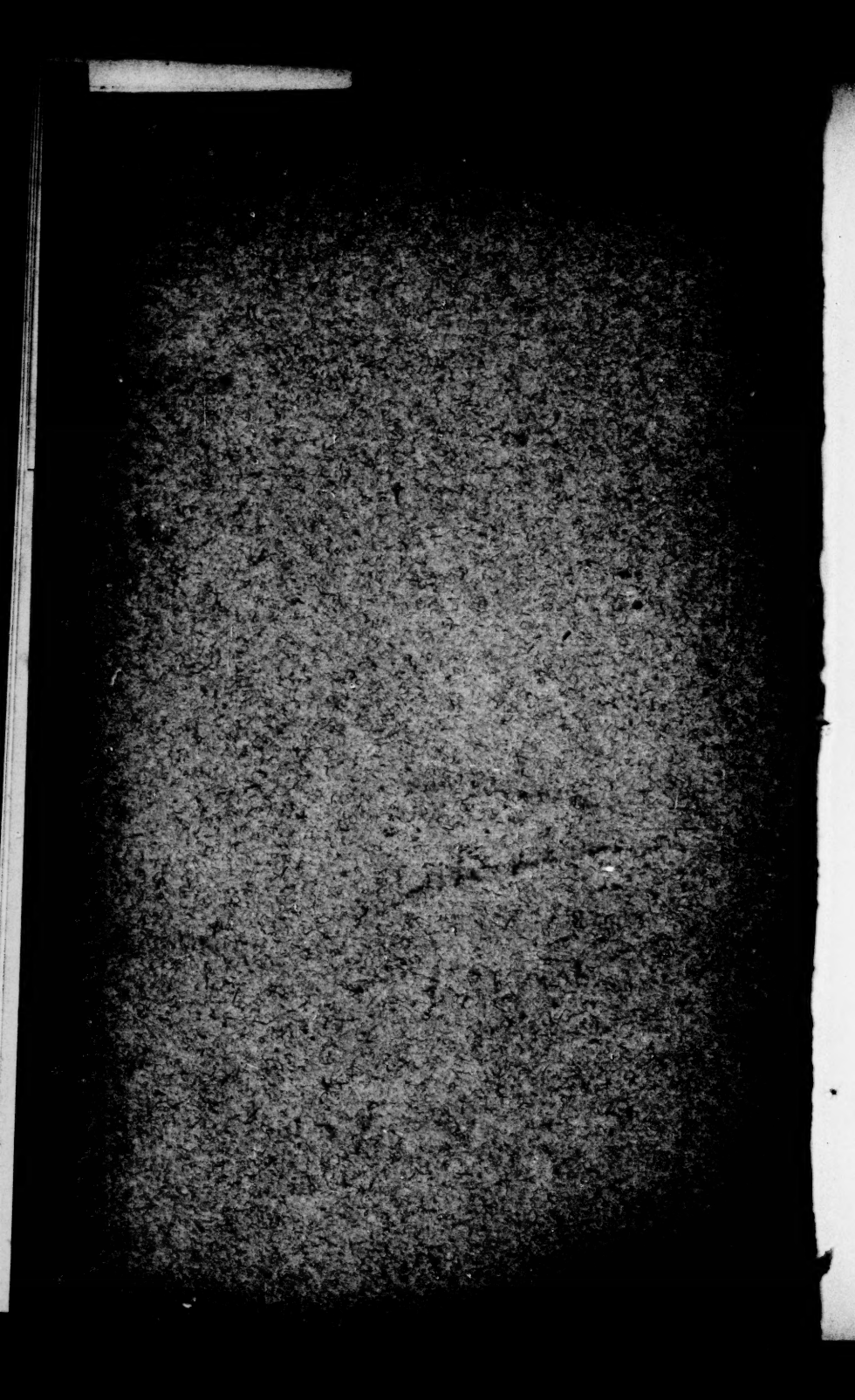
58 William Street,

New York.

New York:

HAMILTON STEAM PRINT, 12 Barclay St. Telephone, 67 Cortlandt.

1894.



Hamilton Steam Print, 19 Barclay St. Telephone, 67 Cortlandt.

Supreme Court

OF THE UNITED STATES.

IN THE MATTER

of

The Petition of Leonora A. Arnold and Thomas E. Arnold, her husband, for a writ of certiorari.

Brief on behalf of the respondent, Charles A. Chesebrough, in opposition to the granting of said petition.

Point I.

This Court is asked to grant a writ of certiorari, to bring this case up from the United States Circuit Court of Appeals for the Second Circuit, for review, because there is a large amount of property involved.

Our answer to this is: That if it had been the intention of Congress to make the right of appeal to this Court dependent upon the amount of property involved it would have been so provided in the statute creating the Circuit Courts of Appeal.

Congress, however, seems to have been guided by a different principle, and the question whether a case shall be brought from the United States Circuit Court of Appeals to this Court for review is not made to depend in any wise upon the amount in controversy. For the purpose of a review in this Court, a case involving $10,000 stands apparently upon the same ground as one involving ten millions. For the purpose of keeping trivial cases out of the court of last resort, Congress and the legislatures of the several States have sometimes provided that a case should not be appealable thereto except when it involved a controversy equal to some certain amount. Farther than this, no legislative body in this country has, so far as I know, ever attempted to give a case involving large amounts of property any precedence, prestige or distinction over one involving a smaller amount. It might be argued that an error in a case involving a million dollars was more serious than one involving only ten thousand dollars; but, on the other hand, it can be argued with equal force that the delay and uncertainty attending on an appeal in the case involving a million dollars is much more serious than in a case involving only a comparatively small amount. Particularly is this true when the controversy is, as in this case, over unimproved real estate, and titles cannot be given or the property utilized until the controversy is finally settled.

Point II.

It is also urged that this case should be heard by the Supreme Court, because it involves a question of marriage.

The answer to this proposition likewise is that if Congress had intended that cases involving a question of marriage should be appealable to this Court, it would have so enacted.

What is really involved in this case is a title to property. This title, it is true, may depend upon a question of marriage, but every disputed point must depend upon some question, and I know of no reason why any distinction should be made, either in law or in morals, between a controversy of this nature and any other controversy.

The complainant is undoubtedly interested in the question of her legitimacy, but, when a controversy involving that question comes into Court, it must be solved by the same rules of law and in the same manner as any other controversy, and the United States Circuit Court and the Circuit Court of Appeals are quite as competent to pass correctly upon such a question as upon any other.

Point III.

This Court is asked to review the decision of the Circuit Court of Appeals, because Mr. Justice Wheeler dissented from the conclusion of the majority of the said Court.

But, if it had been intended that this Court should review a decision of the Circuit Court of Appeals wherever the Judges of said Court differed in opinion, Congress would have so enacted. It has not done so, and it does not appear to be the policy of the statute that this Court shall be called upon to decide between conflicting opinions in the court below. Mr. Justice Wheeler, it is true, placed a different interpretation on the evidence in this case from that placed upon it by Mr. Justice Wallace and Mr. Justice Shipman, but that does not make it necessary, by any means, for this Court to go over the whole of said evidence and determine what interpretation it shall place upon it.

Point IV.

The only question of difference between Mr. Justice Wheeler and his associates was upon the interpretation of the evidence. The difference was entirely one of fact, and not of law. Mr. Justice Wheeler's mind, reading the evidence, reached a different conclusion as to the question of fact involved from that of his associates, but upon all questions of law he agreed with them.

I apprehend the Supreme Court of the United States will not bring a case before it, by writ of certiorari, in order to review a simple question of fact.

The questions of law in the case are very simple. Counsel have differed very little upon them, and there has been an entire agreement as to the rules of law applicable, between the four judges who have had the case before them.

Upon the question of the burden of proof, His Honor, Judge Lacombe, in the Circuit Court, says (Record, Vol. IX, page 420):

> "The question to be determined is a question of fact, to be settled upon a consideration of all the competent and relevant evidence in the case; it is a fact which, at the close of the case, the complainant must show to be established by a fair preponderance of proof. As the evidence is being put in, the weight in either scale may vary and much preponderance may shift from side to side, but the burden of proof which the complainant assumed when she filed her bill, she must show herself able to sustain, when the case is closed, or she has failed. There is no presumption of law in such a case (Blackburn *v.* Crawford 3 Wall., 186). Such presumptions of fact or rather such unproved inferences from proved circumstances as human experience will warrant the trier of the facts in drawing, may constantly vary, may be of greater or less force, controlling of the final decision or of no effect thereon, just as there may be change in the number and

> character of those proved facts from which it is sought to draw the inferences; and the final conclusion must be drawn with a due regard to the entire body of competent and material proof."

Judge Wallace, in the Circuit Court of Appeals, (Vol. X, page 10) says:

> "In such actions the burden of proof is upon the party who asserts the marriage; but the law presumes, from considerations of decency and public well-being that every competent couple who ostensibly cohabit as husband and wife, demeaning themselves towards each other as such, and received into society and treated by friends and relatives as being entitled to that status, have been legally married. This presumption is indulged with special cogency when the legitimacy of the offspring is the issue for judgment."

Judge Wheeler, in his dissenting opinion (Vol. X, page 5), clearly recognizes the same principle and says:

> "There is no presumption of legitimacy arising from parentage (Blackburn *v.* Crawford, 3 Wall., 186); but cohabitation as husband and wife is presumed to be lawful, and legitimacy may be found from it; although, if it was illicit in the beginning, the presumption is rebutted until a marriage is shown which would change its character (2 Greenleaf Ev., 162; Jewell *v.* Jewell, 1 How., 219; Gaines *v.* New Orleans, 6 Wall., 642)."

I reprint in the appendix to this brief, pages 27 to 34, Point V, of my brief in the United States Circuit Court of Appeals, upon the question of the burden of proof. I submit that the complainants have no cause to complain of the law upon this point as unanimously enunciated by all of the judges who have passed upon this case.

Upon the question of the admssion of the record of the seduction suit in the Superior Court, there is

a like uniformity of opinion. Judge Lacombe says (Vol. IX, page 425):

> "Rachel Cregier is deceased, but it appears that in 1859 she brought a suit in the Superior Court for the seduction of Josephine against Blazius, alleging that the connection between them continued between April 1st, 1853, and November 16, 1857, and that complainant was born October 9, 1857, as the result of such unlawful connection; and further, that about October 1, 1855, he enticed Josephine away from her mother's house and kept her away two months. The case was tried on inquest before Judge Woodruff and a jury. Mrs. Cregier and the sister, Almira, were examined as witnesses, and there was a verdict for the plaintiff therein of $2,500 (which was subsequently paid). In view of this piece of record evidence it is difficult to see how it can be contended that there was a reputation of marriage in the Cregier family. Certainly no declarations of Rachel to that effect, nor any testimony as to the belief of others, whose information was derived from her, are entitled to much weight. She might have sought to save her daughter's reputation among other members of the family by saying she was married, but it must be assumed she stated what she believed to be the truth when she brought the suit and testified on the trial. The complainant objected to the admission of the record and judgment roll in this seduction suit. It is well settled that in cases of pedigree, family conduct is admissible evidence from which the opinion and belief of the family may be inferred. The judgment roll may fairly be considered competent evidence of family conduct; but if it be not, and if all evidence of the declarations of Rachael Cregier were excluded from the case as hearsay, then there would be left practically no evidence of repute in the Cregier family, except that given by Almira Sisson, which, as she was of such tender age at the time, is certainly of but little weight."

Judge Wallace says (Volume X. page 12):

> "In 1859 Mrs. Cregier brought suit against him for the seduction of Josephine, claiming, in substance that the relations had been illicit while he and Josephine lived together, and that Leonora was the fruit of their unlawful cohabitation. Mrs. Cregier and one of Josephine's sisters were witnesses at the trial of that suit. Blazius did not interpose any defence, and a judgment was obtained against him for $2,500, and subsequently collected."

Also, page 16:

> "None of his relatives supposed him to be married. His boon companions understood her to be his mistress. Some of her relatives and acquaintances doubtless believed that she was his wife. No one was so near to her, nor so likely to have a better appreciation of the true nature of the cohabitation as her own mother. Mrs. Cregier was a hard-headed, practical woman. *What she believed is sufficiently shown by the record of the seduction suit.*"

Also, page 17:

> "Mrs. Cregier was a capable and energetic woman. She took the place, after Josephine disappeared, of father and mother to Leonora. She knew how to find plenty of lawyers to take up litigations upon contingent rewards. When Blazius died, and the proofs were fresh of the relation between him and Josephine, the time had come when she could have asserted Leonora's rights, if she had any, with the prospect of securing for her grandchild, and incidentally to herself, the comforts of an ample fortune. But although she and Josephine concerted together, surveyed the ground and consulted enterprising counsel, no attack was made throughout the four years she lived after the death of Blazius. Her action is unaccountable, except upon the theory that she felt satisfied there was no case sufficiently strong to warrant

> the attempt. She speaks from the grave, an unsummoned witness, whose testimony is more persuasive than that of a score of persons, who, with fragmentary knowledge or confused recollection, speak of incidents which took place twenty years before."

Judge Wheeler, in his dissenting opinion (Vol. X, page 5), says:

> "On February 4, 1859, her mother commenced suit against him for loss of services by her seduction resulting in the birth of the plaintiff and on default and inquest of damages, recovered judgment therein for $2,500."

And page 7:

> "He made conveyances as a single man, and had a draft of a will made which did not mention her or the plaintiff after she had left him, which goes to show that he then held himself out as single, and administration was applied for on his estate as if he had died single; which goes to show that he was to those making the application then reputed to be single. *The record of this suit for seduction seems to be admissible as a declaration by her mother which would tend to show family understanding that there was no marriage.*"

On this question of the admissibility of the record of the seduction suit we seem to have been fortunate enough to convince not only all the judges of the court, including the dissenting judge, but our opponents themselves, for, although Judge Lacombe in the Circuit Court admitted the record, no assignment of errors or complaint is made because he did so (Record, Vol. IX, pages 433 to 435).

I reprint, in the appendix to this brief (pages 82 to 91), my point XIV in the respondent's brief, before the United States Circuit Court of Appeals, upon "The Admissibility of the Seduction Suit Record," and I submit that there is no basis for a claim that the Court erred in admitting it.

We offered considerable evidence as to the declarations of Blazius M. Chesebrough, made after his connection with this woman had ceased, but, upon the hearing, this was all ruled out by his Honor, Judge Lacombe; and, in his opinion, Judge Lacombe expressly states that he disregards such evidence (Vol. IX, fols. 1269–70). We took no appeal and made no assignment of error. The evidence, being ruled out at the beginning, cannot be considered in the case now, and no question of law can arise over it.

All the judges before whom this case has been have agreed as to what constitutes marriage and how it may be proved. Judge Lacombe says (Vol. IX, page 421):

> "Marriage may be proved by circumstantial evidence, by proof of the acts and declarations of the parties, of their cohabitation as husband and wife, holding themselves out to the world as sustaining that honorable relation to each other. But neither such a course of life nor such declarations *make* a marriage, nor do they even directly or affirmatively establish it. They may, if satisfactorily proved and sufficiently strong, be legitimate grounds for inferring that there has been a valid marriage—a contract that is (with or without any ceremony) whereby at some time and place the parties agree together per *verba de presenti* to be husband and wife, following that agreement by cohabitation as such. Whoever asserts a marriage as the basis of a claim at law or in equity must satisfy the Court, upon a whole case, by a fair preponderance of proof—not necessarily where and when such contract was made—but that at some time and place it was made. If it is sought to prove that fact by circumstantial evidence, the triers of the fact must first determine what circumstances are fairly proved, and then decide whether all those circumstances taken together constrain the mind to accept the inference that such contract was made."

And page 424:

"Inasmuch as they lived together for several years, it is quite natural that the question what relation they bore to each other suggested itself to other members of his family. In such cases evidence of repute in the family is admissible. Without discussing at length the evidence of the various members of the Storms family (other than Christian), whose source of information seems to have been their father (a gentleman who in his lifetime put himself on record, under oath, as believing Blazius to be unmarried), it is sufficient to say that the repute in the Chesebrough family was divided, and the same may be said of a repute among his associates and friends. *But a divided reputation is not sufficient to warrant the inference of marriage* (Clayton *v.* Wardell, 4 N. Y., 230; Brinckley *v.* Brinckley, 50 N. Y., 184).

As to the reputation in the Creiger family, it is to be noted that the evidence of the cousins, Mrs. Irving and Mrs. Franklin, and of the sister-in-law, Mrs. George W. Cregier, is principally, if not wholly, based upon what they heard from Mrs. Rachel Cregier. The same ought, perhaps, to be said of the evidence of Josephine's sister, Almira (Mrs. Sisson) who was but nine years old when the intercourse began, and twelve years old when it terminated.

Rachel Cregier is deceased, but it appears that in 1859 she brought a suit in the Superior Court for the seduction of Josephine against Blazius, alleging that the connection between them continued between April 1, 1853, and November 16, 1857, and that complainant was born October 9, 1857, as the result of such unlawful connection; and further that about October 1st, 1855, he enticed Josephine away from her mother's house and kept her away two months. The case was tried on inquest before Judge Woodruff and a jury, Mrs. Cregier and the sister Almira were examined as witnesses, and there was a verdict for the plaintiff therein of $2,500 (which was subsequently paid). In view of this piece of record evidence it is difficult to see how it can be con-

tended that there was a reputation of marriage in the Cregier family."

Judge Wallace says (Vol. X., page 10):

> "A perfect marriage may be constituted by the consent of the parties to live together as husband and wife as well as by a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the deduction as well as by direct evidence. But in the absence of direct proof, marriage cannot be proved by cohabitation alone, however long maintained. The evidence must support a matrimonial cohabitation as distinguished from a meretricious one. (Commonwealth *v.* Stump, 53 Penn. St., 132; Rose *v.* Clark, 8 Paige, 573; Cunningham *v.* Cunningham, 2 Dows Parl. Rep., 482.) The facts that parties have publicly acknowledged each other as husband and wife, have assumed the marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them. Both cohabitation and reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage. *A divided repute, however, is of no efficacy. It must be a general and consistent one to be of value.*"

Also page 15:

> "*The reputation of the relation was at best a divided one.* It was convenient, and, indeed, for some purposes was necessary, that they should maintain the semblance of a matrimonial relation. If they had not done so, they would not have been received in such hotels and boarding houses as suited his ambitious tastes. Some of their acquaintances would have ignored them. Tradesmen would have been less indulgent. Even their servants would have treated them with less civility."

Judge Wheeler says (Vol. X, page 7):

> "This is all reputation and not direct proof, and is to be considered in connection with other proof in arriving at what the extent and pervasiveness of the reputation of marriage or no marriage really was. *When all this is considered it shows, as found by the Circuit Court, a reputation too much divided to prove a marriage.* It is also too much divided to disprove a marriage otherwise shown, if admissible at all for that purpose."

I reprint in the appendix, from my brief in the United States Circuit Court of Appeals, Point XI (pages 73 to 76), on "What is Marriage?" Point XII (pages 76 to 82), "Reputation, Recognition and Cohabitation, when Evidence of Marriage," Point XLIV (pages 148 to 152), "Cohabitation, to be evidence of marriage, must be matrimonial cohabitation," Point XLV (pages 152 to 166), "The evidence taken together is much more consistent with an illicit than a matrimonial connection."

Judge Lacombe, Judge Wallace, Judge Shipman and Judge Wheeler are also all agreed upon the proposition of law, that there is no presumption of marriage arising from a cohabitation illicit in its origin.

Judge Lacombe says (Vol. IX, page 422):

> "In 1854, when he first encountered Josephine Cregier (though some testimony would make the date 1853) he was about 35 years of age, and she was 16. They met at Sirocco's dancing rooms in Bond street (Blazius having apartments in the same building) and that same night she shared his bed. Shortly thereafter she left her mother's home and lived with him in Bond street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection."

And again, page 423:

> "The intercourse was originally meretricious, and there was no reason why Blazius should change it. Marriage was not needed as the price to be paid for the gratification of some passion. The girl had already yielded, apparently without much objection, to his solicitation, and was living with him as his mistress. That marriage was a reparation which he ought to make to her for having gratified his passion at the sacrifice of her virtue was an idea which there is certainly no reason to suppose would ever have entered the head of Blazius Chesebrough, nor been entertained there long had it been suggested by another. Until the time when they separated, in 1858, they lived together as husband and wife, to the extent at least of sharing the same rooms and indicating to hotel keepers, dressmakers, servants and others with whom they necessarily had occasion to come in contact that their relationship was a proper one. Standing alone, such testimony would be very strong evidence in support of an asserted marriage, but it is also the way in which man and mistress frequently live, in which it may be said they must live if they frequent respectable hotels, *and when it appears that their living thus together began illicitly, something more than mere continuance, coupled with such declarations as would make that continuance pleasant for them, is needed to support an inference that they were married.* There seems to be nothing to distinguish the cohabitation which immediately succeeded the first meeting at Sirocco's from the cohabitation which followed the month of October, 1854, when, it is claimed, they were married in Baltimore. There is nothing to exclude the natural inference that the former relation continued, nor to satisfactorily prove that it had been changed into that of an actual marriage by mutual consent."

And again, page 426:

> "Considered together, the testimony is not sufficiently strong to constrain the mind

to accept it as a natural inference that the arrogant, selfish, dissolute man of thirty-five ever married the young girl of sixteen, whose feeble virtue yielded so promptly to his solicitations, who began life with him as his mistress, and who left him without any effort to obtain from him, or from his estate, the support which the law secured to her, if she were his wedded wife."

Judge Wallace says (Vol. X, page 15):

"The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blazius, satisfies us that the relation was a meretricious rather than a lawful one.

As the question is wholly one of facts, we shall content ourselves with a few general observations upon the proofs.

Irrespective of the admissions of Josephine, the testimony satisfies us that the cohabitation was illicit in its origin. This being so, it is presumed to have continued illicit; and all presumptions in favor of the innocence and morality of the parties are repelled. Men sometimes marry their mistresses, but such cases are the exception. After there has been an open illicit commerce they seldom accord to the woman who has forfeited all claims to her own self-respect and to the countenance of her friend, the rights of a wife. The ordinary presumption against a subsequent marriage is stronger than usual in this case, because each of the parties regarded the marriage tie with contempt. He was a frequenter of houses of ill-fame. Her notions of propriety are shown by her summary abandonment of her infant child, and becoming the mistress of Jackson."

And again, page 17:

"It has been observed by the courts, that the concomitants of those living in illicit intercourse together are often identical with those of married people."

Breadalbane *v.* Breadalbane, H. L. S., 182.
Goldbeck *v.* Goldbeck, 18 N. J. Eq., 42.
Barnum *v.* Barnum, 42 Md., 251.

And again, page 18:

> "It is not surprising that to some extent there should have been a repute that Blazius and Josephine were married. It is not strange that Leonora, a motherless child, practically, should have gone by the name of Chesebrough. It is not strange that the infant, who died at the hotel where they had registered and lived as though they married, should be buried as the child of Mr. and Mrs. Chesebrough. In our judgment there is hardly an established fact in the record which is inconsistent with the theory that they held themselves out as husband and wife merely for motives of expediency, while the presumption from facts well proved, and the considerations arising from most demonstrative conduct, denote that the real relation did not exist."

Judge Wheeler says (Volume X, page 4):

> "They met at a dancing-school in Bond street, in a building where he had rooms, *and she stayed with him in his rooms that night and lived with him some time afterwards before any pretense of marriage.*"

And again, page 5:

> "Cohabitation as husband and wife is presumed to be lawful and legitimacy may be found from it; although if it was illicit in the beginning, the presumption is rebutted until a marriage is shown which would change its character (2 Greenleaf Ev., 162; Jewell *v.* Jewell, 1 How., 219; Gaines *v.* New Orleans, 6 Wall., 642)"

I reprint in the appendix (pages 1 to 23) the third point of my brief in the Circuit Court of Appeals upon "The Court did not err in holding

that the relationship between Blazius M. Chesebrough and Josephine Cregier was 'originally meretricious,' " and, I submit, that the complainant has nothing to complain of in this case upon that subject.

I trust that I have shown clearly and to the satisfaction of the Court both that upon all the questions of law in this case Mr. Justice Wheeler who delivered the dissenting opinion was in substantial accord with Mr. Justice Lacombe, Mr. Justice Wallace and Mr. Justice Shipman, and that, upon all those questions of law, their harmonious judgment was entirely right and well justified by logic, principle and authority.

They all agree—

(1). That the burden of proof rests upon the complainant to establish the fact of the marriage.

(2). That the record of the seduction suit in the Superior Court was properly admitted in evidence.

(3). That the declarations of Blazius M. Chesebrough after the relationship had ceased were ruled out by Mr. Justice Lacombe, that we have submitted to that ruling, and that no question of law can now possibly arise in relation to them.

(4). There is entire harmony among the four Judges as to what constitutes marriage and how it may be proved, and, practically, there is also harmony among the counsel upon this subject, for there is hardly a question of law relating to this point that my friends on the other side can assert, to which I do not accede. The law on this subject is so well settled that there is scarcely any room for difference of opinion.

(5). It is agreed by all the learned Judges, and abundantly established by authority, that a rela-

tionship, originally meretricious, is presumed to continue so until the contrary is proved.

It would be difficult to find a case in which the questions of law are better settled and more clearly recognized by the Court and all the counsel engaged in the case.

The only difference between Mr. Justice Wheeler and his associates is upon a simple question of fact. He applies the same principles of law that they do, but reaches a different conclusion from a consideration of the evidence. All the judges agree that the question is one of fact only. Mr. Justice Wallace says (Vol. X, page 15):

> "*As the question is wholly one of facts*, we shall content ourselves with a few general observations upon the proofs."

Mr. Justice Wheeler says (Vol. X, page 5):

> "The Circuit Court found and held that there was no marriage, and dismissed the bill. The assignment of errors on this appeal relates principally to this ruling."

Mr. Justice Lacombe says (Vol. IX, page 422):

> "To discuss at length this testimony, extremely voluminous and a large part of it taken under exception, is wholly unnecessary. The point to be decided is purely a question of fact. *The conclusion reached, after consideration of a multitude of circumstances peculiar to the case, would be of no value as a precedent in other cases where the circumstances were not identical.* It will be enough, therefore, to indicate, with great brevity, some of the reasons which lead to the conclusion that Blazius M. Chesebrough and Josephine Cregier were not husband and wife."

Again, page 426:

> "Considered together, the testimony is not sufficiently strong to constrain the mind to

> accept it as a natural inference that the arrogant, selfish, dissolute man of thirty-five ever married the young girl of sixteen, whose feeble virtue yielded so promptly to his solicitations, who began life with him as his mistress, and who left him without any effort to obtain from him, or from his estate, the support which the law secured to her, if she were his wedded wife."

In his analysis of the evidence relating to the reputation of marriage, and his judgment as to its effect, Mr. Justice Wheeler hardly differs at all from the other Judges. He says (Vol. X, page 7):

> "When all this is considered, it shows, as found by the Circuit Court, a reputation too much divided to prove a marriage."

I think I may fairly say the only point of difference between Mr. Justice Wheeler and his associates is as to the credibility of the evidence of the woman Josephine.

Josephine was first called as a witness for the complainants, and this was her testimony (Vol. III, page 1387):

> "Q. Were you ever married? A. Yes, sir.
> Q. To whom? A. Blazius Moore Chesebrough.
> Q. In 1854? A. Yes, sir; in 1854.
> Q. Where? A. In Baltimore, Md.
> Q. Had anything previously occurred between you as to a marriage before this time? A. Yes, I lived with him a short time before I was married to him."

She is not asked to give, and does not give any particulars of the marriage. She does not state when it occurred, except that it was in the year 1854. She does not state at what particular place in Baltimore it occurred, only that it was in Baltimore, Md. She tells of no one who was present. She gives none of the circumstances attending the marriage. She leaves it simply unenvironed and

hung in mid-air between heaven and earth. A marriage license was necessary in the State of Maryland at this time, and it was a criminal offense to perform the ceremony without one. We searched the Maryland records from top to bottom, and no such license had ever been issued. It had to be celebrated before a minister and a record kept of it. There was no record whatever. It was customary for newspapers to publish the fact of a marriage. There was no publication. She said they stopped at Barnum's Hotel for several days at a time, and we showed that no persons of that name had ever registered at that hotel (Vol. IX, fols. 79 to 201; Vol. VII, fols. 574 to 600; Vol. VIII, fols. 514 to 630; 667 to 932).

There was not a particle of corroboration of the story anywhere, although if it had been true, evidence in corroboration would have been easy to produce.

We did, however, bring out on her cross-examination some quite remarkable facts. She testified that previous to this most strange and unexampled marriage journey, ever since the evening of the Sirocco ball, where she had first met Chesebrough and passed the night with him in his room above, they had lived in those rooms in illicit and sinful intercourse. That they made their journey to Baltimore in a carriage; that the journey occupied several days, and that they stopped at hotels for the night, always occupying the same bed, and that when they arrived in Baltimore the first thing they did, before any thought of marriage, was to go to another hotel and take a room together, more anxious apparently to satisfy their lust than to obey the law of God; that after a few days' stay in Baltimore they drove home again and lived together at his rooms over Sirocco's Dancing Academy, in exactly the same way as they did before the Baltimore trip; and that, after a few years of alliance of this kind, she left him and her child forever, without ceremony or compunction.

and lived thereafter as the open and avowed mistress of a gambler—first in Charleston, S. C., and then in Nashville, Tennessee; that although Mr. Chesebrough was a man of wealth, the then recipient of a large income and the expectant heir of an immense fortune, she never made any claim that she was his wife, demanded any of the rights of wifehood, or asked from him anything in the way of the support or assistance to which she would have clearly been entitled had there ever been a marriage. On the contrary, her mother brought a suit against Mr. Chesebrough for the seduction of Josephine and for her loss of services arising therefrom, claiming that this child, Leonora, was born as the fruit of such seduction, and she recovered a verdict against him for $2,500, which he paid. When Blazius died his brother claimed his estate on the ground that he was intestate and left no issue, and took it without objection from anybody, and no claim was made to this large fortune until more than twenty years after this woman Josephine had left him and fourteen years after he had died, when her daughter married a rich speculator, Mr. Arnold, and the plan was devised down in Nashville, Tenn., to make an assault upon this Chesebrough fortune, and this suit is the result (Vol. III, fols. 4173 to 4195; Vol. VI, fols. 99 to 126; 539 to 565; 744 to 770; 1115 to 1123; 1146 to 1175; Vol. VIII, fols. 217 to 299; 475 to 497; Vol. IX., fols. 25 to 78; 715 to 759; Vol. VII, fols. 462 to 572; Vol. IV, fols. 4951 to 4956; 4870 to 4872, 5050 to 5834).

We believed her story of a marriage in Baltimore to be a bare and bald lie, made out of whole cloth, and we set to work so to prove, and succeeded so well that this woman voluntarily, and of her own motion, came upon the witness-stand again and testified as follows (Vol. VII, fols. 806 to 812):

"Q. What is your name? A. Josephine Cregier.

Q. Are you the same person who formerly

testified in this case under the name of Josephine Chesebrough? A. I am.

Q. Were you ever married? A. No, sir.

Q. Was the statement you made on your former examination that you were married to Blazius M. Chesebrough, and that he was your husband, correct? A. No, sir.

Q. Was there ever any marriage ceremony or marriage agreement between you and Blazius M. Chesebrough? A. No, sir.

Q. Was anything ever said between you on the subject of marriage? A. Nothing more than he promised after his mother's death to marry me.

Q. Do you mean that the promise was made after his mother's death? A. No, sir, before his mother's death.

Q. Did he tell you or promise you when he would marry you? A. Not till after his mother's death.

Q. Did you ever visit Philadelphia or any place in company with Blazius M. Chesebrough and a child? A. No, sir.

Q. Did you ever at any time during the lifetime of Blazius M. Chesebrough consider yourself or believe yourself to be his wife? A. No, sir."

And again (Vol. VII, fols. 913 to 928):

"Q. What did you mean when you said in answer to Mr. Arnold's question that you lived with Mr. Chesebrough as his wife? A. Well, I was obliged to take his name, or I could not live in a respectable boarding house; I knew and he knew that I was not his wife.

Q. Do you remember the occasion when you first stayed with him, or commenced to live with him? A. Yes, sir.

Q. Where was it? A. No. 16 Bond street, New York City.

Q. Did Mr. Chesebrough have his room there at that time? A. Yes, he did.

Q. And was there also in the same building a dancing-school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the

and lived thereafter as the open and avowed mistress of a gambler—first in Charleston, S. C., and then in Nashville, Tennessee; that although Mr. Chesebrough was a man of wealth, the then recipient of a large income and the expectant heir of an immense fortune, she never made any claim that she was his wife, demanded any of the rights of wifehood, or asked from him anything in the way of the support or assistance to which she would have clearly been entitled had there ever been a marriage. On the contrary, her mother brought a suit against Mr. Chesebrough for the seduction of Josephine and for her loss of services arising therefrom, claiming that this child, Leonora, was born as the fruit of such seduction, and she recovered a verdict against him for $2,500, which he paid. When Blazius died his brother claimed his estate on the ground that he was intestate and left no issue, and took it without objection from anybody, and no claim was made to this large fortune until more than twenty years after this woman Josephine had left him and fourteen years after he had died, when her daughter married a rich speculator, Mr. Arnold, and the plan was devised down in Nashville, Tenn., to make an assault upon this Chesebrough fortune, and this suit is the result (Vol. III. fols. 4173 to 4195; Vol. VI, fols. 99 to 126; 539 to 565; 744 to 770; 1115 to 1123; 1146 to 1175; Vol. VIII, fols. 217 to 299; 475 to 497; Vol. IX., fols. 25 to 78; 715 to 759; Vol. VII, fols. 462 to 572; Vol. IV, fols. 4951 to 4956; 4870 to 4872, 5050 to 5834).

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Q. And was there also in the same building a dancing-school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the

first time, where did you go from? A. From the hall down-stairs, the dancing hall.

Q. Had you ever met him before except at the dancing-school? A. No; that is the first place I met him at.

Q. Had you ever met him before outside of the dancing-school, before the time you first went to his room? A. No, sir.

Q. What time of the day was it? A. I don't remember whether day or night, I think it was night.

Q. Did you spend the night with him at his room at that time? A. Yes.

Q. Did you go to his room for the purpose of spending the night, or staying with him? A. Yes.

Q. From what time did you commence to live with him? A. Six weeks or a couple of months after that night, after the first night that I slept there, as near as I can recollect.

Q. Where did you pass the time during those six weeks or two months? A. At home, at my mother's.

Q. At the time you commenced to live with him where did you live with him? A. 16 Bond street, the same place.

Q. At the time that you commenced to live with him, some six weeks or two months after the night you first stayed with him, had anything been said between you on the subject of marriage? A. No, sir.

Q. How long after that, if ever, was that subject spoken of? A. Some time after that, I can't remember exactly. He made a promise that he would marry me after his mother's death, and that was all that was said between us, as near as I can recollect, it was a long time ago.

Q. Did you at any time while living with Mr. Chesebrough consider yourself his wife or believe yourself to be his wife? A. No, sir.

Q. So far as you know did he at any time consider himself to be your husband, or believe himself to be your husband? A. No, sir.

Q. Was there ever at any time any change in the relationship between you from the time you first visited his room as you have

mentioned, till the time you ceased to live with him? A. No.

Q. Did you ever use the name of Chesebrough as your own name or call yourself Mrs. Chesebrough from the time you left Mr. Chesebrough as you have stated up to the time you were called upon in Nashville by the complainant as you have testified, and her husband? A. Not to my recollection."

The difference between the Judges below over the testimony of this woman, Josephine, is stated in their opinions as follows:

Mr. Justice Lacombe (Vol. IX, page 422) says of it:

"In 1854 when he first encountered Josephine Cregier (though some testimony would make the date 1853), he was about thirty-five years of age and she was sixteen. They met at Sirocco's dancing-rooms in Bond street (Blazius having apartments in the same building) and that same night she shared his bed. Shortly thereafter she left her mother's home, and lived with him in Bond street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection. It is contended by the complainant that subsequently in 1854 they were married in the City of Baltimore, whither they made a trip for that express purpose, and Josephine herself testifying for the complainant, gave direct evidence to that effect. Subsequently, when called by the defendants, she retracted her former statement and testified that she was never married to Blazius M. Chesebrough in Baltimore or elsewhere. If her later testimony were to be accepted, there need be no further inquiry. Certainly in view of her admitted perjury, the complainant cannot insist that her testimony affords direct proof of a marriage. If her evidence both ways on that point be disregarded, such proof can only be found, if at all, as a necessary and natural inference from all such circumstances as are established by the testimony of creditable witnesses."

Mr. Justice Wallace says (Vol. X, pages 13 and 14):

"The only record of a ceremonial marriage which appears in the record consists of the testimony of Josephine, the alleged wife. She testifies as a witness for the complainants, that after she and Blazius had lived together for some time they went to Baltimore, Maryland, and were married there by a clergyman, at his house. She could not give his name or residence and stated that no witnesses were present. She made no mention of a marriage certificate, or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place, or the persons performing it, or the attending circumstances. *It suffices to say of it that it was improbable and incredible.* She did testify, however, that while in Baltimore they stopped at Barnum's Hotel. It is in proof that no persons of their name were guests of that hotel. There was no publication of marriage, and no license to marry; and in the absence of a license it would have been a criminal offense on the part of the clergyman to perform the ceremony. At a later stage in the taking of the proofs, she testified as a witness for the defendants and made a complete retraction of her previous testimony relative to a ceremonial marriage. She then testified that there never was a ceremonial marriage, and that during the time they lived together she never considered or believed herself to be the wife of Blazius. When asked, however, if anything had been said between them relative to a marriage, she stated that he had promised her that he would marry her when his mother should die, but she gave no details as to the time, occasion or circumstances of such a conversation. *Of course no credit ought to be given to the testimony of a witness who has committed bald perjury. We cannot say whether she testified truthfully in her original or in her subsequent testimony.* Certainly if any of her statements can be accepted as credible, it is only those which would be against her probable interest

or inclination to make. We may believe that on the first occasion when she met Blazius she surrendered her person to him, and that she lived with him for some period of time before the alleged ceremony of marriage, and that she left him clandestinely and lived in the South as the wife of another man, until after his death. She testified to these facts originally, when she was trying to appear as a semi-respectable woman, and as to them, did not recant in her subsequent testimony; but her testimony is worthless as to every other material fact which she might suppose would be of benefit to either of the parties.

We must reject as unworthy of credit the direct evidence of marriage. If there was a promise to marry her at some future time, *cum copula*, there was no marriage according to the law of their domicile.

Cheney *v.* Arnold, 15 N. Y., 345.
Meister *v.* Moore, 96 U. S., 76.

The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blazius satisfies us that the relation was a meretricious rather than a lawful one."

Mr. Justice Wheeler differed from the other judges in this particular. He says (Vol. X, pages 5 and 6):

"This suit is brought on behalf of the plaintiff, Leonora Augusta, as his heir. Her mother was present at the examination of witnesses in behalf of the plaintiffs, and testified that in driving about they drove to Baltimore and were married there in 1854, before going to the Everett House to board; afterwards she testified in behalf of the defendant that this was false, and that they were never married, and never understood that they were, but that they agreed to be married when his mother should die.

The Circuit Court found and held that there was no marriage and dismissed the bill. The assignment of errors upon this appeal relates principally to this ruling.

> There is no presumption of legitimacy arising from parentage (Blackburn *v.* Crawford, 3 Wall. 186); but cohabitation as husband and wife is presumed to be lawful, and legitimacy may be found from it; although if it was illicit in the beginning, the presumption is rebutted until a marriage is shown which would change its character (2 Greenleaf Ev., 162; Jewell *v.* Jewell, 1 How., 219; Gaines *v.* New Orleans, 6 Wall., 642). The mother's testimony that there was a marriage remains in the case, although retracted, and is strongly corroborated by their holding themselves out as husband and wife and living together openly as such at respectable hotels and boarding houses; and particularly by their recognition of each other as married parents at the time of the death and burial of their first child. She could destroy the force of her testimony so far as it rested upon her truthfulness, but it could not take it away from the support of this corroboration. Her first testimony was consistent with their acts and conduct, but the last was not."

The first grave and important question, therefore, which my opponents ask this court to certify up to it for review is this: Which time did this woman Josephine lie? Was it her first or her last utterance which spoke the truth, or is it all entirely unworthy of credit?

My own views upon that question, and the evidence and authorities to support them, are contained in certain points in my brief before the Circuit Court of Appeals, which are reprinted in the appendix to this brief: Point III (pages 1 to 23): "The Court did not err in holding that the relationship between Blazius M. Chesebrough and Josephine Cregier was originally meretricious." Point IV (pages 23 to 26): "The Court did not err in the conclusion that Blazius M. Chesebrough and Josephine Cregier were not husband and wife." Point VI (pages 34 to 59): "The evolution of the perjury." Point

VII (pages 59 to 73): "The testimony of Josephine." Point XLV (pages 152 to 166): "The evidence taken altogether is much more consistent with an illicit than with a matrimonial connection."

Point V.

The "undisputed facts," set forth in pages 5 to 8 of the Petitioner's Brief, are almost all either disputed in the testimony or negatived by it.

Our opponents speak of Josephine Cregier as a young lady "of Christian training and bringing up."

Her life previous to the time that she met Mr. Chesebrough is not in evidence, but I suppose her "Christian training" is to be inferred from the fact, which appears clearly in the evidence and *is* "undisputed," that she met Mr. Chesebrough one night at a dance house on Bond street, for the first time, and that very night, quite naturally and contentedly, shared his room and bed upon the floor above. She returned to her mother the next morning, and the little occurrence of the night before does not seem to have troubled either her mother or herself. The escapade appears to have been frequently repeated, and finally to have gradually evolved into the regular relationship of paramour and mistress. Her mother knew of it; made no particular complaint about it; and it seems to have been accepted in the family as a very natural and proper thing (Vol. III, fols. 4158 to 4159; Vol. VII, fols. 805 to 928; Vol. IX, fols. 25 to 78).

The respectability of the widow (Mrs. Rachel Cregier), the mother of Josephine, which is also asserted by my opponents as an "undisputed fact," is not proved unless the above evidence established it.

The respectability of the "School for Instruction and Dancing," which is also asserted as an "undisputed fact," may be also considered as proven in the same way.

A "courtship" of six months and an "elopement" to Baltimore is likewise alleged as an "undisputed fact." It is such if the word "courtship" can be extended to cover the relation of a paramour and his mistress, living together and occupying the same rooms and the same bed without any pretence or thought of marriage; and if it can be considered an "elopement" for these same people to have left Mr. Chesebrough's rooms, over this dance house, where they had been living during this "courtship of six months" and going off on a licentious debauch, on a carriage drive through New York, New Jersey, Pennsylvania, Delaware and Maryland, occupying the same rooms and the same bed every night before there was any pretence of a marriage.

It is claimed as an "undisputed fact" that after this debauch "they claimed upon their return to have been duly married by a clergyman, and duly announced that fact to her parents."

There is no evidence upon this subject except that of Josephine, and she says (Vol. VII, fol. 812):

> "Q. Did you ever, at any time during the lifetime of Blazius M. Chesebrough, consider yourself or believe yourself to be his wife? A. No, sir.

And (Vol. VII, fols. 926 to 928):

> "Q. Did you at any time, while living with Mr. Chesebrough, consider yourself his wife or believe yourself to be his wife? A. No, sir.
>
> Q. So far as you know, did he at any time consider himself to be your husband or believe himself to be your husband? A. No, sir.
>
> Q. Was there, at any time, any change in the relationship between you, from the time

you first visited his room, as you have mentioned, till the time you ceased to live with him? A. No.

My opponents state as an "undisputed fact" that

> "This cohabitation between them as husband and wife was known to the members of their respective families, and during all of that time they were regarded as husband and wife by their respective families, and were visited by them during that time."

Mrs. Rachel Cregier did know of the "cohabitation" between Mr. Chesebrough and her daughter, but it can hardly be said that she knew of it as a "cohabitation as husband and wife," in view of the fact that five years after it commenced she sued Mr. Chesebrough for the "seduction" of her daughter Josephine, alleging the birth of this complainant as the fruit of such seduction; testified that there was never any marriage or claim of marriage between the parties, and recovered a verdict for the seduction, which brought this complainant into the world, for $2,500, and collected it (Vol. IX, fols. 25 to 78; Vol. VII, fols. 17 to 48).

There were four other members of Mrs. Rachel Cregier or Josephine Cregier's family, living at home during all the period of the alleged relationship between Blazius and Josephine—one son, or brother, and three daughters, or sisters. The son, George W. Cregier, is now living in this city, and is a gentleman of excellent reputation and high character, and an officer of one of our courts. He was not called as a witness (Vol. III, fols. 3493 and 3820 to 3830). The only one of the Rachel Cregier family who was called was the youngest daughter, who was eight years old when the relationship commenced and twelve years old when it was concluded by Josephine's desertion of Blazius in favor of her gambler lover, and who had been a witness in the famous seduction suit in the Superior Court,

where she had testified that there had been no marriage (Vol. III, fols. 3490 to 4110; Vol. IX, fols. 25 to 28).

As she swore one way in the seduction suit and another way in this case, and was too young to know anything about the real relationship any way, her testimony may be easily dismissed.

My view of it is set forth in Point XV of the respondent's brief in the Circuit Court of Appeals, reprinted in the appendix to this brief (pages 91 to 113), "The testimony of Almira W. Sisson."

The only thing in evidence, therefore, to show what was "known to the members" of the Cregier family is contained in the record of the seduction suit, where it is alleged, in Mrs. Cregier's complaint, that the complainant was the fruit of a seduction and not of a marriage, and the testimony of Mrs. Sisson, who testified on the trial of that suit to the same effect.

It is difficult to analyze the state of mind of the petitioner's counsel which induced them to make the assertion that "this cohabitation between them (Blazius and Josephine) *as husband and wife* was known to the members" of the Cregier family.

The problem is equally difficult in reference to their statement that "this cohabitation between them as husband and wife was known to the members of" the Chesebrough family.

We examined at some length the relatives of the Chesebrough family and those who were specially acquainted with the family history.

Mr. Blaise Ryer testified (Vol. VI, fols. 99 to 128) that he and Mrs. Chesebrough were own cousins. He was also a close neighbor of the Chesebrough family for many years, and still resides at the corner of Kingsbridge road and 182d street, just opposite the old Chesebrough mansion. He had known Blazius M. Chesebrough from his childhood and during all his lifetime, up to two or three weeks of the time he died, he saw him frequently and associated with him intimately, and was on terms of

equal intimacy with all the other members of the Chesebrough family. The two families—the Ryer and the Chesebrough family—lived for many years only 200 feet distant the one from the other.

Mr. Ryer had never known or heard it spoken of in the family that Blazius was married. On the contrary, he had always known him as an unmarried man.

Mrs. Haley, a sister of Blaise Ryer, testified to the same effect (Vol. VI, fols. 127 to 141).

Mrs. Maria Hegeman was a first cousin of Mrs. Margaret Chesebrough; had lived near neighbors to them for many years; was very intimate with Mrs. Chesebrough and knew all her family.

She had never heard that Blazius was married, nor any suggestion or intimation to that effect.

Mrs. Amelia R. Moore, a sister of Mrs. Hegeman, testified to the same effect (Vol. VI, fols. 156 to 171).

Martin Brill was a confidential man of business for Mrs. Chesebrough and attended to all her affairs; knew Blazius and all the family very intimately; and he never knew or had any information that Blazius was married; had never heard it spoken of in the family; and the commencement of this suit was the first intimation he ever had of such a thing (Vol. VI, fols. 172 to 245).

Oscar Hudson was also connected with the firm which did Mrs. Chesebrough's business and knew the family concerns very intimately, and he testifies that he never heard that Blazius was married (Vol. VI, fols. 245 to 263).

Mrs. Martha M. Bowers was a relative by marriage of the Chesebroughs, and her family and Mrs. Chesebrough's family were very intimate and she had never heard that Blazius whs married (Vol. VI, fols. 264 to 305).

Mary Roose was a servant in Mr. Chesebrough's family during all the time of this alleged relationship between Blazius and Josephine and subsequently in the house of Blazius, himself.

She testified that Blazius always had his washing

done at his mother's house and made that his home, and that she had never heard that he was married, but had heard Mrs. Chesebrough say a great many times that she wished he would get married (Vol. VI, fols. 306 to 357).

Mr. Jeremiah V. Spader and his wife, Mrs. Spader, belonged to the Chesebrough family, and were well acquainted with them, and they had never heard any suggestion or intimation that Blazius was married.

Mr. Frederick W. Geissenheimer, a well known and distinguished gentleman and lawyer in this city, was a cousin of Mrs. Chesebrough; had been acquainted with her from his earliest recollection down to the time of her death; his family and hers visited each other very frequently, and he himself was Mrs. Chesebrough's lawyer and confidential counsel and adviser. He knew Blazius well and also knew this woman, Josephine, and knew the relationship which existed between Blazius and Josephine.

He testifies that he never knew or suspected that Blazius and Josephine were married. He had talked with Mrs. Chesebrough many times about Blazius, and she always spoke of him as an unmarried man, and that so far as he knew she had no knowledge or suspicion that he was married.

Blazius introduced Josephine to him at one time as his mistress (Vol. VI, fols. 958 to 1002).

Mr. Charles A. Chesebrough, the defendant, himself testifies (Vol. VII, fols. 1001 to 1048; 1111 to 1119) that he was always on intimate terms with his mother and his brother, Blazius, and that he knew of Josephine; that he never heard it suggested or intimated that Blazius was married; and that so far as he knew his mother never had any suspicion that her son Blazius was married.

The two brothers dealt with one another, and made deeds of valuable real estate to one anether long after this connection between Blazius and

Josephine was known, and in the deeds he was described as an unmarried man, and no wife ever joined therein (Vol. V, fol. 1314; Vol. VII, fols. 1000 to 1048 and fols. 2774 to 2796; Vol. IX, fols. 548 to 587; Vol. II, fols. 2878 to 2882).

And yet the learned counsel upon the other side coolly state in their brief that it is an "undisputed fact" that "this cohabitation between them (Blazius and Josephine) *as husband and wife* was known to the members of their respective families, and during all of that time they were regarded as husband and wife by their respective families."

The Storms family were relatives of Mrs. Chesebrough, and they, the Storms and Chesebrough families, have not been friends for years. The complainants attempted to take advantage of this feeling of enmity and envy which existed on the part of the Storms family towards the Chesebroughs and to make use of them as witnesses in this case. Three of them were called as witnesses —Christian S. Storms, Mrs. Fitzgerald and Miss Eliza Storms. But their testimony, so far as it bore against the defendant, was thoroughly discredited. It was shown that they derived all their knowledge from their father, who, after the death of Blazius M. Chesebrough had deliberately testified, in a judicial proceeding in the Surrogate's Court, that Blazius M. Chesebrough had never been married and that he left no wife or child, and who, during the lifetime of Blazius, had been concerned in the drawing of a will for him which recited the fact that his brother, Mr. Charles A. Chesebrough, was his only heir and next of kin.

The testimony of these witnesses from the Storms family is fully discussed in our brief in the Circuit Court of Appeals, in Point XXII (pages 113 to 128 of the Appendix), "The Storms Family," Point XXIII (Pages 128 to 134 of the Appendix), "The Unexecuted Will," Point XXIV (Pages 134 to 135 of the Appendix), "The Special Fictions of

Mrs. Fitzgerald," Point XXV (Page 136 of the Appendix), "Mrs. Fitzgerald's story that Mrs. Margaret Chesebrough talked of Blazius as if he were married, and recognized Josephine as his wife," Point XXVI (Page 137 of the Appendix), "The evidence of Mrs. Fitzgerald as to Mr. Charles A. Chesebrough's abuse of his mother," Point XXVII (Pages 137 to 138), "The Apparent Deliberate Perjury of Mrs. Fitzgerald." Point XXVIII (Pages 139 to 147 of the Appendix), "Mr. Christian S. Storms," Point XXIX (Pages 147 to 148 of the Appendix), "These three children of Gen. Henry Storms are thoroughly discredited."

The "baby clothes" story, referred to in the petitioner's brief, is one of Mrs. Fitzgerald's fictions, and falls with the rest of her testimony.

The petitioner's counsel say in their brief that "The birth and death of the first child was duly and publicly announced."

This is a misstatement, pure and simple. It was kept a close secret, so that even Josephine's mother, Mrs. Rachel Cregier, never knew of it, and four years afterwards, when she brought her seduction suit, she alleged the date of Josephine's seduction by Mr. Chesebrough as exactly nine months before the birth of the *second* child, this complainant (Vol. IX, fols. 25 to 78).

The birth of the second child did, it is true, take place in Mrs. Rachel Cregier's own home, but Mrs. Cregier's views upon the subject of the relationship between her daughter and Mr. Chesebrough is best shown by the record of her suit for seduction.

This is not the first time that a woman who has sinned has come back to her mother's house to be delivered of the fruit of her shame.

Our opponents, in their brief, state as an "undisputed fact" that—

> "One year and a half thereafter, the defendant, Chesebrough, for money considera-

> tion, as appears by her own testimony and that of other witnesses of defendant's, suborned Josephine to commit perjury and testify that no marriage had taken place as she had previously stated, and that she had lived with him during all this time as his wife under a promise on his part that he would marry her immediately on his mother's death."

There is no evidence to support this statement, nothing from which any such inference can be drawn or suspected, and no basis whatever for it.

It is not only not an "undisputed fact," but it is an absolute and baseless falsehood.

The other matters, to which I have not specifically referred, stated in the petitioner's brief as "undisputed facts," are either not facts at all or truths greatly distorted and perverted. I will not weary the Court by going over them more in detail at this point.

Point VI.

My opponents seemed to place a great deal of reliance in their brief upon the case of Badger *v.* Badger, 88 N. Y., 546.

We do not quarrel at all with the law laid down in this case of Badger *v.* Badger. I differ from my opponents very little on questions of law of any kind. The difference between the case of Badger *v.* Badger and Arnold *v.* Chesebrough is not in the law, but in the facts.

The question in Badger *v.* Badger was one of marriage, and everything depended on the force and validity of the evidence relating to reputation. The case had been tried by a jury and the jury had found in favor of the marriage. The Court of Appeals sustained the judgment, and Mr. Justice Finch, in writing the opinion, lays down the rule

which should govern cases of that nature. I have never objected to that rule and have been entirely willing that it should be applied to this case, and so stated on the argument before the Circuit Court of Appeals. The difficulty which our opponents will find in getting consolation from this case of Badger *v.* Badger is with their facts rather than with their law. The evidence in one case could hardly differ from the evidence in another more than the evidence in that case from the evidence in this.

Mr. Justice Finch lays down the law as follows:

> "The reputation attending this cohabitation in the neighborhood where it existed, and was known among those brought into its presence by relationship, business or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the *shadow cast by their daily lives* (I Bishop on Marriage and Divorce, Sec. 438). In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest, because disinterested, and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrases of a verdict the teaching of many incidents and the conduct of years."

In the case of Arnold *v.* Chesebrough, what is the "shadow cast by the daily lives of the parties?" Was it that which "ordinarily attends the dwelling together of husband and wife?"

Is the conduct which Daniel Goff saw at the Holdridge House (Vol. I, pages 209 to 265), which Lawrence Harran describes as occurring at Jamaica and Rockaway, Long Island, Paterson and Rahway, N. J., and at Philadelphia, Pa., marital? Were these "jamborees" (to use the expressive word of

the witness Harran), when Mr. Chesebrough used to send for her to go and meet him at different places (places of assignation) (Vol. I, fol. 1060), where he indulged in his wild orgies and satisfied his lust without regard to publicity or any of the proprieties, such as a loving husband indulges in with his faithful wife?

Is the picture drawn of the birth of the first born child in Saratoga the picture which ordinarily attends the birth of the first born child of lawful wedlock? (Vol I, pages 7 to 54) Was the carriage journey to Baltimore from the scene of their illicit intercourse on Bond street and their nightly cohabitation upon the road a usual and customary wedding journey? Was the conduct which Mr. Nichols described at Utica (Vol. VI, pages 334 to 372) marital? Was the Clifton House episode, described by Mr. Shears (Vol. VIII, pages 159 to 171), such as usually attends a marriage relationship? Do the events related by Mr. Bensel (Vol. III, pages 73 to 158) as occurring on that famous drive through Central New York, indicate that the parties regarded one another as husband and wife?

How different is "the picture drawn" and "the shadow cast" in that case and in ours!

"*There*"—to quote further from the words of the Court—

> "The association began when the plaintiff was young and the decedent in middle life, and continued until he fell dead, an old man of seventy-six. It lasted without break or interruption. It survived the loss of youth and its attractions. It ran on through sickness, paralysis and some degree of mental weakness. It showed no trace of the satisfied passion that tires of its victim and abandons her for a new temptation. It did not change when the girl had grown into the matron and become deaf and lame. It stayed with a tenacity of love and duty, remaining patient and faithful until the end. It is argued with great force that if this relation

> was that only of lover and mistress it approached strangely near to matrimonial truth and devotion, and gave to unlawful lust an endurance and virtue not common or expected."

Here—Arnold *v.* Chesebrough—the association, such as it was, began when the woman was sixteen and continued, off and on, at intervals, until she was twenty, and then she left him and took up a similar association with another man, and her first paramour went his way with other women. It was fitful and inconstant and full of breaks and interruptions. It endured only for a few brief years, during the first dawn of youth. It did not last even to the full development of womanly beauty. It scarcely reached to womanhood, much less did it survive the loss of youth and its attractions. It did not run on through "sickness, paralysis and mental weakness." It showed, not only at its conclusion, but all through its continuance, every trace of the satisfied passion that tires of its victim and abandons him or her for new temptations. It continued only for a brief period, till the carnal appetite was satisfied by its sexual enjoyment, and neither did it stay with the tenacity of love or duty, or remain faithful and patient until the end. In fact, the evidence shows that it was never patient or faithful, but that it was, at all times, fitful, spasmodic and inconstant. It cannot be claimed for it that it approached matrimonial truth or devotion, or gave to its unlawful lust any more endurance or virtue than is common or expected between the ordinary paramour and his concubine.

This case lacks every element of marital character which *that* case possessed, and every trait which we expect to find characterizing the association of those between whom the marriage relation exists.

What man that was ever born of pure and virtuous woman will say that "the shadow cast by the daily lives" of Blazius and Josephine was the

shadow of the lives of people joined together in pure and holy marriage?

Point VII.

The other cases quoted by counsel for the petitioners in their brief lay down rules of law, to most of which we take no exception. Many of the cases we have quoted to sustain our position. In fact, if their brief before the Circuit Court of Appeals and ours was examined, it would be found that we both rely upon substantially the same authorities and the same rules of law.

But we read the evidence very differently.

Point VIII.

My opponents lay great stress in their brief upon "the necessity of uniformity of decision."

I have no particular cause for quarrel with them here.

I have already shown that upon the questions of law involved all the judges and all the counsel were substantially agreed.

There has been a "uniformity of decision" all through this case. I am not aware that any point of law decided in this case is in conflict with any other decision anywhere in the books.

I hardly think that the "necessity of uniformity of decision" extends so far as to make it of public importance that every judge before whom a case comes should interpret evidence and give credibility to witnesses in exactly the same way and to the same extent.

Point IX.

The petitioners say in their brief:

> "Irrespective of the importance of this question to the petitioner and her children, this application for a writ of certiorari is also made upon the ground that a question of law of great public importance is involved in this case, upon which the Circuit Court of Appeals was divided, and that is, assuming the testimony of Josephine, when called as a witness for the defendant, to be true, whether or not it does not establish a marriage between her and Blazius valid at common law."

"The testimony of Josephine, when called as a witness for the defendant," referred to (Vol. VII, fols. 808 to 818), was as follows:

> "Q. What is your name? A. Josephine Cregier.
>
> Q. Are you the same person who formerly testified in this case under the name of Josephine Chesebrough? A. I am.
>
> Q. Were you ever married? A. No, sir.
>
> Q. Was the statement you made on your former examination that you were married to Blazius M. Chesebrough, and that he was your husband, correct? A. No, sir.
>
> Q. Was there ever any marriage ceremony or marriage agreement between you and Blazius M. Chesebrough? A. No, sir.
>
> Q. Was anything ever said between you on the subject of marriage? A. Nothing more than he promised, after his mother's death, to marry me.
>
> Q. Do you mean that the promise was made after his mother's death? A. No, sir; before his mother's death.
>
> Q. Did he tell you or promise you when he would marry you? A. Not till after his mother's death.
>
> Q. Did you ever at any time during the lifetime of Blazius M. Chesebrough consider yourself or believe yourself to be his wife? A. No, sir."

And fols. 913 to 928:

"Q. What did you mean when you said in answer to Mr. Arnold's question that you lived with Mr. Chesebrough as his wife? A. Well, I was obliged to take his name or I could not live in a respectable boarding house; I knew, and he knew, that I was not his wife.

Q. Do you remember the occasion when you first stayed with him or commenced to live with him? A. Yes, sir.

Q. Where was it? A. No. 16 Bond street, New York City.

Q. Did Mr. Chesebrough have his room there at that time? A. Yes, he did.

Q. And was there also in the same building a dancing school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the first time, where did you go from? A. From the hall down-stairs, the dancing hall.

Q. Had you ever met him before except at the dancing school? A. No, that is the first place I met him at.

Q. Had you ever met him before outside of the dancing school before the time you first went to his room? A. No, sir.

Q. What time in the day was it? A. I don't remember whether day or night; I think it was night.

Q. Did you spend the night with him at his room at that time? A. Yes.

Q. Did you go to his room for the purpose of spending the night or staying with him? A. Yes.

Q. From what time did you commence to live with him? A. Six weeks or a couple of months after that night, after the first night that I slept there, as near as I can recollect.

Q. Where did you pass the time during those six weeks or two months? A. At home, at my mother's.

Q. At the time you commenced to live with him where did you live with him? A. 16 Bond street, the same place.

Q. *At the time that you commenced to live*

with him, some six weeks or two months after the night you first stayed with him, had anything been said between you on the subject of marriage? A. No, sir.

Q. How long after that, if ever, was that subject spoken of? A. Some time after that; I can't remember exactly. He made a promise that he would marry me after his mother's death, and that was all that was said between us, as near as I can recollect; it was a long time ago.

Q. Did you at any time, while living with Mr. Chesebrough, consider yourself his wife, or believe yourself to be his wife? A. No, sir.

Q. So far as you know, did he at any time consider himself to be your husband, or believe himself to be your husband? A. No, sir.

Q. Was there ever at any time any change in the relationship between you from the time you first visited his room, as you have mentioned, till the time you ceased to live with him? A. No.

Q. Did you ever use the name of Chesebrough as your own name, or call yourself Mrs. Chesebrough, from the time you left Mr. Chesebrough, as you have stated, up to the time you were called upon in Nashville by the complainant, as you have testified, and her husband? A. Not to my recollection."

Josephine left Mr. Chesebrough forever as early at least as 1858, and they never saw one another afterwards (Vol. III, fols. 4158 to 4195), and Mrs. Margaret Chesebrough did not die until 1860 (Vol. II, fols. 2416 to 2796) So that if this is considered a promise of marriage *de futuro*, the promise never became due. It will be noted that this promise was not given as an inducement for her to surrender her chastity, and not until long after they had been living together in meretricious relationship, and there is no evidence or suggestion whatsoever that they ever changed their mode of life in any manner.

Mr. Justice Wheeler, at the close of his opinion (page 22 of petition), says:

> "Furthermore, as laid down by Sir William Blackstone, any contract made *per verba de presenti*, and in case of cohabitation *per verba de futuro*, was deemed a valid marriage (1 Comm., 465). This is also laid down by Chancellor Kent, (1 Comm., 87,) and by Prof. Greenleaf, (2 Ev., S. 460).
>
> The Circuit Court for the District of South Carolina so charged the jury in Jewell *v.* Jewell, 1 How., 219, and the Supreme Court, being equally divided, did not reverse this ruling. The testimony of the mother as to the agreement to marry is not retracted, nor contradicted, and is corroborated by the same circumstances as her testimony of the marriage. *If this be true, and that be law, the plaintiff is legitimate.*"

There are two very big "ifs" at the conclusion of Mr. Justice Wheeler's opinion. *If* Josephine's story is believed, and *if* this proposition be law, he says the plaintiff is legitimate. He does not express his opinion as to whether the proposition is or is not law. He had already reached his conclusion upon other grounds. It cannot be said that even on this point he is in conflict with the other judges.

In the case of Jewell *v.* Jewell, to which he refers, Chief Justice Taney, delivering the opinion of the Court, says:

> "The Circuit Court held, and so instructed the jury, that if they believed that before any sexual connection between the parties they, in the presence of his family and friends, agreed to marry, and did afterwards live together as man and wife, the tie was indissoluble, even by mutual consent, and that if the contract be made *per verba de presenti* and remains without cohabitation, or if made *per verba de futuro* and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve, and that it

is equally binding as if made in *facie ecclesiae*. Upon this point thus decided, the Court is equally divided, and no opinion can therefore be given."

Our case differs from the case of Jewell *v.* Jewell in three very important particulars:

(1). The promise in Jewell *v.* Jewell was made, if at all, "before any sexual connection between the parties," and the charge to the jury is based explicitly upon that fact, while in our case it is not made until long afterwards. In the one case it was the price paid for the woman's virtue; in the other it was made long after that virtue had been lost, and does not even appear to have been mutual.

(2). In the case of Jewell *v.* Jewell they, "in the presence of his family and friends agreed to marry, and did afterwards live together as man and wife," and the charge that thereafter "the tie was indissoluble, even by mutual consent," is based explicitly upon that proposition. In Arnold *v.* Chesebrough, if any promise was made, it was not "in the presence of anyone," and as we claim, and think we have shown, they never lived together "as man and wife."

(3). The charge in Jewell *v.* Jewell was made also upon the explicit supposition that the promise made *per verba de futuro* "be *followed* by consummation." In our case the consummation took place long *before* there was any pretence of a promise, and there is nothing which followed the promise that can be considered in any way as a consummation. The illicit cohabitation which followed this alleged promise is not shown or suggested to have been by reason of it, but is explicitly stated to have been of precisely the same nature as that which preceded it. There was

clearly nothing between Blazius and Josephine that is worthy to be dignified with the title of "consummation of a marriage."

But all this discussion is idle. Both parties were residents and citizens of the State of New York. The consummation and the promise took place in the State of New York, and the question whether that constituted or did not constitute a marriage is to be determined by the laws of the State of New York, and the decisions of the Court of Appeals of the State of New York upon what is the law of this State are final and binding upon this court.

In Meister *v.* Moore, 96 U. S., 82, a case in this particular exactly parallel with ours, Mr. Justice Strong, delivering the opinion of the Supreme Court of the United States, says:

> "It is unnecessary, however, to pursue the line of thought. If there has been a construction given to the statute by the Supreme Court of Michigan, that constrnction must, in this case, be controlling with us.

If there has ever been any doubt in the State of New York as to whether a promise of marriage, "*per verba de futuro* followed by consummation" constituted a marriage, the Court of Appeals of the State of New York, in the case of Cheney *v.* Arnold, 15 N. Y., 345, set this question at rest forever, and held, in the words of the head-notes of that case, as follows:

> "A contract to marry, *per verba de futuro*, though followed by cohabitation, does not amount to a marriage in fact. The *dictum* of Cowen, J., in Starr *v.* Peck (1 Hill, 224), to the contrary, disapproved.
>
> Such a contract, with cohabitation upon the faith of it, was ground for a decree enforcing a performance, by formal solemnization, in the ecclesiastical courts, and was, for some purposes, regarded as a valid marriage by the *canon law*, but, it seems, never constituted a valid marriage at *common law*."

The case of Cheney *v.* Arnold reviews all the preceding cases, including those so disingenuously cited by my opponents in their brief, and, after full consideration, Chief Justice Denio delivers the opinion, and forever settles the law upon this point for the State of New York.

Chief Justice Denio's opinion is so clear and convincing in its reasoning, and so decisive in its results, that I quote it here in full for the convenience of the Court:

> "DENIO, C. J.: The plaintiff, Phila Cheney, claims to be the daughter of Charles Harris, who is admitted to have been seized of the premises claimed in this action, and she seeks to recover, as his heir. The defendant claims under a conveyance from her mother, Betsey Pike, formerly Betsey Harris, and he insists that the plaintiff is not the legitimate daughter of Charles Harris, and cannot, therefore, inherit from him, though it is not denied that she is his natural daughter.
>
> Upon the question of the plaintiff's legitimacy there was no room for controversy about the facts. It was proved by the plaintiff's own witness, Betsey Pike, that when her daughter the plaintiff, was born, she had not been married to Charles Harris, the plaintiff's father. She swore, however, that there was a mutual engagement between them to be married to each other at some future time, and that after such engagement the plaintiff was begotten, and that their marriage was actually celebrated a few months after the plaintiff's birth. There was no cohabitation between them as husband and wife; they did not hold themselves out, and they were not recognized by their relatives or acquaintances, as married persons, until the formal marriage. The plaintiff was, however, brought up by them, and always recognized as their daughter. The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the Judge consequently committed an error in

submitting the question to the jury whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character, as he maintains that, in either case, they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to become husband and wife in *presenti*, but there was an agreement to be married *in futuro*, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married, and the plaintiff is legitimate; otherwise she is not.

There is a *dictum* by Judge Cowen, in Starr *v.* Peck (1 Hill, 274), which fully sustains the plaintiff's position, but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties, and the verdict affirmed the existence of a marriage. There was no evidence of a contract, present or future, and it was as easy for the jury to find the one as the other. What was said by the learned judge as to a contract *per verba de futuro* was *obiter*. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: 'If the contract be made *per verba de presenti*, and remains without cohabitation; or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary' (2 Com., 86, 2d ed.). Blackstone too says that in cases of cohabitation, contracts *per verba de futuro* were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled, in the spiritual courts, to celebrate them *in facie ecclesiæ*. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us marriage is simply a civil contract, differing, it is true, from contracts upon other subjects, in the circumstances that it is not

in the power of the parties to release or dissolve it, but partaking, in many other particulars, of the nature of common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be, in terms and intent, executory or executed. If executed —that is, if the parties agree *eo instanti* to take each other for husband and wife, it is *ipsum matrimonium*. If executory in its terms, it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages. If it were like some other common law contracts, an action, in the nature of a bill in equity, might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically, and we have no tribunals corresponding with the English ecclesiastical courts which did formerly exercise such a jurisdiction (Burtis *v.* Burtis, Hopk., 557). Our courts have all the jurisdiction of the English common law and equity courts, which has not been denied them by the Legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that, if parties agree to marry, and one of them refuse to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties or confer any rights upon the issue of such connection.

If, by the law of England as it existed at

the Revolution, and as it was then administered in the temporal courts, an agreement to marry, followed by intercourse, consituted marriage, then, as we have adopted that system, and no change in that particular has been made by statute, we must hold that the plaintiff's parents were married before she was born, and that she is legitimate. It is clear that such a doctrine existed in the canon law: and that system, with some modifications, was, in a general sense, the basis of the matrimonial law of the nations of Europe, England included (Dalrymple *v.* Dalrymple, 2 Hagg., 54). It was the law of the church, and was administered in the spiritual courts. Marriage contracts, whether by words in the present tense or *per verba de futuro*, which were followed by consummation, were not considered perfect marriages, but the spiritual courts had a jurisdiction to compel their due celebration *in facie ecclesiæ*. In the meantime, a certain effect was given to them before celebration. The parties were, for some, and perhaps for most, purposes considered as husband and wife. The present question is, how far the law of England regarded such irregular marriages as sufficient to predicate legitimacy of the offspring. Sir William Scott (afterwards Lord Stowell), in his masterly judgment in Dalrymple *v.* Dalrymple, after stating the doctrines of the canon law, to the effect above mentioned, adds, that 'the common law certainly had scruples in applying the civil rights of dower and community of goods and legitimacy in the cases of these looser species of marriage.' The English marriage act of 26 George II, Ch. 33, passed in 1753, as is well known, required marriages to be celebrated in a parish church by banns or by license, and declared all other marriages, with certain exceptions, to be void. It never applied to the colonies, and had no force here. It abolished, in express terms the jurisdiction of the spiritual courts to compel the celebration of a marriage by reason of any contract of matrimony whatever (Sec. 13). It is extremely difficult to ascertain what the English matrimonial law was prior to

this statute, and what it now is in cases to which the statute does not extend. Upon the question whether contracts by present words or by agreement looking to the future for its performance, with carnal intercourse, but without a formal celebration, amounted to a legal marriage, the cases are numerous and conflicting. Some of them, containing *dicta* which would seem to support the proposition contended for by the plaintiff's counsel, are referred to by Judge Cowen. The question has been examined with industry and care by Mr. Jacob, in his *Addenda to Roper's Treatise on Husband and Wife*. (Roper, 445). He has collated, with great discrimination, all the judgments and *dicta*, together with the conclusions of the text writers and the various statutes on the subject passed prior to the Act of George II, and he comes to the confident conclusion that such contracts as we are considering 'did not confer on the woman the right to dower, on the man the right to the woman's property, or on the issue the right of legitimacy, and that it did not render a subsequent marriage with a third person *ipse facto* void at law, though it formed a ground for sentence (in the spiritual courts) annulling it. 'The authorities,' he adds, 'seem to show that, according to the ecclesiastical law, the contract did not give any right except to call for a performance of it by actual solemnization, not justifying cohabitation or conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited and were reputed to be man and wife this might afford sufficient evidence for the purpose of some actions in which strict proof was not required.' Among the authorities referred to, to sustain this opinion, is the speech of Lord Mansfield, then solicitor general, on introducing the marriage act into parliament. He is reported to have said: 'I believe it will be allowed, if a man and woman seriously and sincerely enter into a marriage contract without the interposition of a clergyman or any religious ceremony whatever, it will be a good marriage both by the law of God and the law of nature; yet

the law of this society, and I believe of every other christian society, has declared it not to be a good marriage.' Without further comment on the authorities upon which this writer relies, which have, however, been attentively examined, I am prepared to adopt his conclusion as to the state of the law of England prior to the marriage act. It follows that the doctrine of the canon law, that a contract of marriage *per verba de futuro*, followed by carnal intercourse, was a valid marriage, did not become the law of this State by force of our adoption of the common law of England, for it was not a part of that common law. Should it be said that this course of reasoning would repudiate marriages *per verba de presenti* without solemnization, I answer that the validity of such marriages is firmly established by judicial decisions in this State which we are not at this day at liberty to question (Newton *v.* Reed, 4 John, 52; Jackson *v.* Clow, 18 *id.*, 346; Jackson *v.* Winne, 7 Wend., 47; Rose *v.* Clark, 8 Paige, 574; in the matter of Taylor, 9 *id.*, 611; Clayton *v.* Wardell, 4 Comst., 230); but there is no judicial authority with us in favor of inferring a marriage from an executory agreement followed by intercourse, except the *dictum* in Starr *v.* Peck to which I have referred. But I think the validity of marriages by words of present contract can be shown independently of those cases. Marriage, so far as personal rights and the rights of property were concerned, has always been a civil contract, requiring only the present assent of parties competent to contract and such ceremonial observances as the positive municipal law had prescribed. At the Reformation the ritual of the Reformed Church of England, established by act of Parliament, prescribed the form of the marriage ceremony, which was to be celebrated, through the ministry of the priest, *in facie ecclesiæ*. There was at the same time an ecclesiastical judicature, with jurisdiction over questions of marriage and divorce. In adopting the common law purely, the prescriptions of the prayer-book and the laws concerning the ecclesiastical judicature disappeared from the

system. We inherited simply the principle which declared marriage to be a civil contract. The common law itself supplied us with all necessary rules for determining the requisites for entering into the contract, and moreover prescribed the legal relations established by and the legal consequence which followed, a valid marriage. The principle that a promise, followed by intercourse, was in some sense a marriage, was a branch of the ecclesiastical system resulting from the acknowledged jurisdiction of the ecclesiastical courts to compel the performance of such marriages by spiritual censures. Having dispensed with that jurisdiction, we cannot consistently acknowledge any marriage to be valid which requires the intervention of a spiritual court to make it perfect. We must insist upon those circumstances which the law requires in an executed contract upon any other subject. Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. That this has been the sense of the legal profession and of the courts is evident from the rules relating to several actions in common use. If a man seduce a woman under a promise of marriage, we allow an action for the seduction at the suit of the father, and an action for a breach of the promise at the suit of the daughter (Foster *v.* Scoffield, 1 John., 297; Gillet *v.* Mead, 7 Wend., 193; Brownell *v.* McEwen, 5 Denio, 367). According to the plaintiff's argument both actions would be absurdities; for the marriage being complete by the act complained of, there would be no seduction and no breach of promise. So in the action for a breach of a promise of marriage, if it appear that the plaintiff, on the faith of the defendant's promise, has been seduced by him and has become *enciente*, it is considered as a circumstance of great aggravation and the damages are proportionably increased; whereas, if the plaintiff's position is sound, the defendant by the very act has made all the repara-

tion in his power and has become the husband of the plaintiff. The Legislature, moreover, has not understood the law as the plaintiff does. By an act passed in 1848 (Session Laws, Ch. 111), the seducing and having illicit conversation with an unmarried female *under promise of marriage* is made a misdemeanor punishable by imprisonment; but the offense may be absolved by a *subsequent* marriage. The Legislature intended by this enactment to protect female purity and not to deprive a wife of her lawful husband.

The foregoing considerations have satisfied me that the plaintiff's doctrine is not the law of this State. No evidence was produced respecting the matrimonial law of Rhode Island. In the absence of such evidence we are to intend that it is the same as our law.

It follows from what has been said that the plaintiff is not the legitimate child of Charles Harris. She cannot consequently recover as his heir. When she had shown the facts respecting her legitimacy, the Judge should have decided the case upon the question of law and have directed a verdict for the defendant. She cannot complain of directions which gave her a chance for a verdict to which she was not entitled.

The judgment should be affirmed.

Bowen, J., also delivered an opinion for affirmance, and all the judges who had heard the argument concurred.

Judgment affirmed."

The second "grave and important question" which my opponents desire to have this court certify up to it for review seems to be, therefore, whether the deliberate and unquestioned decision of the Court of Appeals of the State of New York is the law of that State.

Point X.

The cross-examination of the woman, Josephine, the last time she was called as a witness, only emphasizes the testimony given on her direct-examination.

The statement of such cross-examination contained in the petitioner's brief (pages 16, 17 and 18) is entirely misleading and incorrect.

Counsel say (foot of page 16):

> "First she says that no religious ceremony was performed in Baltimore, *as she first testified to.*"

She did not at first, or at any time, ever testify to any religious ceremony in Baltimore or anywhere else. This is her testimony, and her whole testimony, upon that subject, on her first examination (Vol. III, fol. 4158):

> "Q. Were you ever married? A. Yes, sir.
> Q. To whom? A. Blazius Moore Chesebrough.
> Q. In 1854? A. Yes, sir; in 1854.
> Q. Where? A. In Baltimore, Md.
> Q. Had anything previously occurred between you as to a marriage before this time? A. Yes. I lived with him a short time before I was married to him."

There is nothing whatever in this testimony about a religious ceremony, and she has never testified, either when they called her, or when we called her, that there was any such ceremony.

I do not understand counsel's state of mind which leads them to make such a statement.

The next thing they say is (top of page 17):

> "She says (on her cross-examination at the time of her second examination) that she was there (at Baltimore) with Blazius *at that time*" (the time of the alleged marriage).

What she did say was as follows (Vol. VII, fols. 869, 870):

> "Q. You have been in Baltimore with Mr. Chesebrough, have you not? A. Yes.
> Q. On more than one occasion, too, have you not? A. Yes.
> Q. Do you remember about what years? A. No, sir.
> Q. It was before the birth of either of your children, was it not? A. Yes, I was there before their birth and after too
> Q. And stopped at hotels, did you not? A. Yes, sir."

How counsel can say that she says she was there with Blazius *at that time* (the time of the alleged marriage) I do not understand. She says nothing of the kind.

Counsel continue:

> "And that the residence of the clergyman who performed the ceremony, as she first testified to, is correctly described as in Baltimore, Md., in an affidavit which she subsequently made and which was then shown her."

What did happen on the examination was as follows (Vol. VII, fols. 867 to 868):

The witness was confronted with an affidavit which she had previously made, and asked:

> "Q. Will you read this affidavit and tell me what you now claim to be untrue that is in there? A. (Witness reads Complainant's Exhibit Affidavit No. 1). Marriage with Mr. Chesebrough is not true for one thing; saying the minister's residence was in Bath is untrue. *I never said that.*
> Q. That is Baltimore, not Bath? A. Then that is correct. Mr. Clapp was not the proprietor of the hotel. Marvin is correct. It has not been changed as I see.
> Q. Anything else? A. No, sir.
> Q. The other statements, then, with those exceptions are all correct. A. Yes, sir, I

think so; except what I told you, *marriage with Mr. Chesebrough is not correct.*

Q. Except what you have stated? A. Yes, sir."

Nothing can be clearer than that what the witness intended to say and did say was not that she was married by a minister in Baltimore, but that she had previously *incorrectly* stated in her affidavit that such was the case.

In this testimony she positively denies not only that she was married by a minister in Baltimore, but that she was ever married, anyway, anywhere. And yet counsel evidently intend that the Court shall infer that she testified on this examination "that the residence of the clergyman who performed the ceremony" was in Baltimore, Md. A half truth is often more misleading than an entire misstatement.

It appears that in 1880 this witness Josephine made an affidavit in answer to interrogatories which are not produced, in which she stated:

> "My maiden name was Josephine Cregier. I was fourteen years of age when married to Blazius M. Chesebrough in 1853, in the City of Baltimore, Md.
>
> Have no certificate of our marriage, nor do I know the name of the minister who married us; were married, as I believed, in the minister's house in Baltimore, but do not know the number or name of the street; no witnesses were present at the ceremony."

This affidavit is contained in Vol. IV, fols. 4942 to 4949. It appears in the record only because Josephine was confronted with it on her cross-examination the last time she was called as a witness. It was undoubtedly proper to exhibit to her a previous statement inconsistent with what she was now testifying to, and the statement is properly put in evidence to impeach, so far as it goes, the testimony she was then giving. But there is no possible rule of law under which it can be considered as evidence

of the facts stated therein. It was an *ex parte* affidavit, not taken in any judicial proceeding, and with no opportunity for cross-examination, and now, in so far as it contradicts her testimony, repudiated by the witness and stated to be incorrect and false.

Counsel upon the other side attempt to befog the case by mixing the statements of this affidavit with the statements which she actually made upon the witness stand. The unsupported statement, given without any details and in the most loose and slovenly manner possible in this affidavit, that she was married by a minister in Baltimore, she now states to have been entirely false, and that affidavit can be considered evidence in the case only for the purpose of testing her credibility.

Counsel state (Petitioner's Brief, page 17):

> "In the next place she states that she and Blazius lived together for upwards of five years as husband and wife, holding each other out to the world as sustaining that relation, and that their cohabitation was as that of husband and wife."

What she did state was as follows (fols. 870 to 872):

> "Q. What I understand you to now contradict in your previous testimony and affidavits is that you went through the ceremony of marriage with Blazius M. Chesebrough? A. Didn't go through no ceremony of marriage, no ceremony with him.
>
> Q. Is that what you contradict? A. Yes, I said I was married; I wish to contradict it.
>
> Q. You don't wish to contradict what you testified to before, that you lived with Blazius M. Chesebrough for several years, and was introduced by him to others as his wife, and was addressed as such, do you; do you wish to contradict that? A. I wish to contradict that I was his wife.
>
> Q. (Repeated.) A. No.
>
> Q. That is true, is it not? A. Yes, sir.
>
> Q. And that was in the State of New York?

A. I resided in different places; I resided in New York one time. I resided in different places while I was with him—different cities —different States.

Q. Were not the occasions of your being in different cities outside the State of New York temporary, and while travelling? A. Yes.

Q. And his and your residence was in the City of New York, was it not? A. Yes."

And, fols. 926 to 927:

"Q. Did you, at any time, while living with Mr. Chesebrough, consider yourself his wife, or believe yourself to be his wife? A. No, sir.

Q. So far as you know did he at any time consider himself to be your husband, or believe himself to be your husband? A. No, sir.

Q. Was there ever at any time any change in the relationship between you from the time you first visited his room as you have mentioned, till the time you ceased to live with him? A. No."

And, fols. 913 to 914:

"Q. What did you mean when you said in answer to Mr. Arnold's question that you lived with Mr. Chesebrough as his wife? A. Well, I was obliged to take his name or I could not live in a respectable boarding-house; *I knew and he knew that I was not his wife.*"

Counsel say (Petitioner's Brief, page 17):

"Next she says that she cohabited with him as his wife, *because* he promised to have a ceremonial marriage performed after the death of his mother."

What she did say was as follows (Vol. VII, fols. 810 to 811):

"Q. Was anything ever said between you on the subject of marriage? A. Nothing

more than he promised, after his mother's death, to marry me.

Q. Do you mean that the promise was made after his mother's death? A. No, sir; before his mother's death.

Q. Did he tell you or promise you when he would marry you? A. Not till after his mother's death.

Q. Did you ever see him after his mother's death? A. No, sir."

And, fols. 883 to 887:

"Q. Now, you say that Chesebrough promised to marry you after his mother's death; when was that made? A. I don't know when; I can't remember those things.

Q. Can you give us an idea at all? A. No, sir; several times.

Q. On several occasions? A. Yes, sir.

Q. Running from the time of your first acquaintance with him? A. Yes.

Q. Did he give any reason why he wanted to wait till his mother died? A. No, sir.

Q. What did you understand by promising to marry you; did you understand that he would go through a formal ceremony of marriage with you? A. Yes.

Q. A religious ceremony? A. Yes, sir.

Q. That promise you say he didn't keep? A. He didn't keep it; no, sir.

Q. That was your desire, was it, to go through such a ceremony? A. Yes, sir.

Q. Did you deem that such a ceremony was desirable? A. Yes, sir.

Q. You had a prejudice in favor of having a religious ceremony of marriage, had you? I don't know.

Q. Do I understand you then that it was a matter of indifference to you? A. No, it was not a matter of indifference; of course, I expected there would be a religious ceremony, *when there was one.*

Q. Do I understand you now that you agreed to live together as man and wife, he promising at a future period to go through a religious ceremony? A. *We made no agreement to live together as man and wife.*

Q. You mean there were no words spoken?

A. *Yes, I mean that there was no agreement to live as man and wife.*

Q. But you did live together as such without any words being spoken between you on the subject, is that it? A. Yes.

Q. And you lived together on that understanding, is that so? A. *We lived together without any understanding.*"

And, fols. 914 to 922.

"Q. Do you remember the occasion when you first stayed with him, or commenced to live with him? A. Yes, sir.

Q. Where was it? A. No. 16 Bond street, New York City.

Q. Did Mr. Chesebrough have his room there at that time? A. Yes, he did.

Q. And was there also in the same building a dancing school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the first time, where did you go from? A. From the hall downstairs, the dancing hall.

Q. Had you ever met him before, except at the dancing school? A. No; that is the first place I met him at.

Q. Had you ever met him before, outside of the dancing school, before the time you first went to his room? A. No, sir.

Q. What time in the day was it? A. I don't remember whether day or night; I think it was night.

Q. Did you spend the night with him at his room at that time? A. Yes.

Q. Did you go to his room for the purpose of spending the night, or staying with him? A. Yes.

Q. From what time did you commence to live with him? A. Six weeks or a couple of months after that night, after the first night that I slept there, as near as I can recollect.

Q. Where did you pass the time during those six weeks or two months? At home, at my mother's.

Q. At the time you commenced to live with him, where did you live with him? A. 16 Bond street, the same place.

Q. *At the time that you commenced to live with him, some six weeks or two months after the night you first stayed with him, had anything been said between you on the subject of marriage?* A. *No, sir.*

Q. How long after that, if ever, was that subject spoken of? A. *Some time after that,* I can't remember exactly. He made a promise that he would marry me after his mother's death, and that was all that was said between us, as near as I can recollect; it was a long time ago."

By what logic the inference is drawn from this testimony that "she cohabitated with him as his wife *because* he promised to have a ceremonial marriage performed after the death of his mother," I do not understand.

Counsel then say (Petitioner's Brief, page 17):

> "Next she testifies that she was led to believe that this living with him as his wife constituted a lawful marriage without being followed by a marriage ceremony."

It is evidently intended that the Court shall infer that she testified that she was so led to believe at the time of the cohabitation; whereas, in fact, she testifies that she was so led to believe by those who surrounded her at the time of her first examination, when she testified as a witness for the complainant (Vol. VII, fols 836 to 838).

She testifies on this examination (Vol. VII, fols. 925 to 927; fols. 886 and 888) that she did not, at any time while living with Mr. Chesebrough, consider herself his wife or believe herself to be his wife, and that, so far as she knew, he did not consider himself to be her husband, or believe himself to be her husband, and that there was never at any time any change in the relationship between them, from the time she first visited his room at the dancing academy, the first night she met him and remained with him all night, until she ceased to live with him, and that their co-

habitation together was without any agreement whatever that they should live as man and wife or without any understanding whatever on the subject.

Counsel say (Petitioner's Brief, page 17):

> "The defendant's counsel attempted to show by her that the promise to have a religious ceremony performed after his mother's death, was not made until after the cohabitation began, and that therefore it was not a part of the agreement under which that cohabitation was entered into. But she failed in this, for she said that her memory was very poor, and that she was *unable to state exactly what the agreement was.*"

There is no evidence whatever that there was any promise to marry, even in the future, or after Mrs. Margaret Chesebrough's death, except that of this witness, Josephine; and if it be true that her memory was so poor, or her moral nature so bad, that she was not to be credited, then there is no credible evidence whatsoever in the case as to any promise or suggestion of marriage in the future, and the whole basis of my opponent's argument as to a marriage *per verba de futuro cum copula*, falls to the ground.

My opponents can take which horn of the dilemma they choose. Either Josephine's memory was good enough to be trusted when she says that this agreement to marry in the future was not made until they had been cohabiting together illicitly for a considerable time, or it is not good enough to prove that there was ever any such agrement whatsoever.

Point XI.

Counsel say (Petitioner's Brief, page 18), that:

> "The evidence shows that this defendant (*for money consideration*) induced her to

change her opinion about this being a valid marriage, and testified that no ceremony was performed and that no mutual agreement to be man and wife was entered into."

The testimony upon this subject is as follows (Vol. VII, fols. 841 to 842):

> "Q. Have you received any money, or any promise of money, from Mr. Chesebrough or his counsel? A. Yes; twenty dollars from Mr. Logan.
>
> Q. Any promise of anything further? A. No, sir; I don't expect anything for telling the truth—don't expect to be paid for it.
>
> Q. You don't expect to get anything from Mr. Chesebrough? A. No, if I don't get anything at all I am satisfied, so that I have told the truth. My conscience is clear."

And, fols. 912 to 913:

> "Q. You said that twenty dollars had been paid to you, when was that? A. The day I left Sand Lake and came down here, last Thursday.
>
> Q. At the time of the service of the subpœna upon you? A. Yes.
>
> Q. It was paid to you as witness fees? A. Yes."

Troy is 156 miles from the Grand Central Depot. Sand Lake (where the woman Josephine was living, at the house of Mr. Averill) is ten miles beyond Troy, and the Brooklyn Court House, where the examination took place, is four miles this side of the Grand Central Depot, making altogether a distance of 170 miles from the place of her residence to the place of her examination The legal witness' fees are five cents a mile, each way, or ten cents a mile one way. Twenty dollars, therefore, exactly pays for one mileage each way and two days' attendance at the legal rate of $1.50 a day.

There is no other evidence or suggestion in the case of any other money being ever paid or promised to be paid, or expected to be paid by or on

behalf of Mr. Chesebrough to this woman, Josephine.

It is the first time I have ever heard it suggested that a witness was corrupted because at the time of the service of the subpœna upon him or her the lawful witness fees and mileage, without which they could not be compelled to attend, were paid.

My views as to what influenced Josephine to make such an exhibition of herself as a witness in this case, and as to when and for what she committed the perjury, are contained in Point VI, of my brief in the Circuit Court of Appeals, reprinted in the Appendix hereto, pages 34 to 59.

Point XII.

I have added as an appendix to this brief some of the points taken from our brief used on the argument before the Circuit Court of Appeals. If the Court chooses to go into the merits of the case, we feel confident that it will agree with Mr. Justice Wallace, Mr. Justice Shipman and Mr. Justice Lacombe, that the complaint had utterly failed to establish her right of action and that her complaint was properly dismissed.

Point XIII.

The petition for a *certiorari* to bring this case before the Supreme Court should be denied.

WALTER S. LOGAN,
Counsel for Respondent,
Charles A. Chesebrough.

APPENDIX.

Points Taken From Respondent's Brief in this Case, in the Circuit Court of Appeals, and Referred to in the Foregoing Brief.

III.

The Court did not err in holding that the relationship between Blazius M. Chesebrough and Josephine Cregier was originally meretricious.

What the learned Judge in the Court below says, in his opinion on this subject, is as follows:

> "The intercourse was originally meretricious, and there was no reason why Blazius should change it. Marriage was not needed as the price to be paid for the gratification of some passion. The girl had already yielded, apparently without much objection, to his sollicitation, and was living with him as his mistress. That marriage was a reparation which he ought to make to her, for having gratified his passion at the sacrifice of her virtue, was an idea which there is certainly no reason to suppose would ever have entered the head of Blazius Chesebrough, nor been entertained there long had it been suggested by another. Until the time when they separated, in 1858, they lived together as husband and wife, to the extent, at least, of sharing the same rooms and indicating to hotel-keepers, dressmakers, servants and others with whom they

necessarily had occasion to come in contact, that their relationship was a proper one. Standing alone, such testimony would be very strong evidence in support of an asserted marriage, but it is also the way in which man and mistress frequently live—in which it may be said they must live, if they frequent respectable hotels; and when it appears that their living thus together began illicitly, something more than mere continuance, coupled with such declarations as would make that continuance pleasant for them, is needed to support an inference that they were married. There seems to be nothing to distinguish the cohabitation which immediately succeeded the first meeting at Sirocco's from the cohabitation which followed the month of October, 1854, when it is claimed they were married in Baltimore. There is nothing to exclude the natural inference that the former relation continued, nor to satisfactorily prove that it had been changed into that of an actual marriage by mutual consent."

The objections, which the astute counsel upon the other side raised to this portion of the opinion, are formulated as follows in the seventh, eighth and ninth assignments of error.

"*Seventh.*—That the Court erred in holding that the intercourse between them was in the first instance meretricious, and that Josephine first lived with him as his mistress, and that this intercourse and relation between them was not changed.

Eighth.—That the Court erred in not holding that the intercourse between them was never meretricious, but lawful and matrimonial, and that Josephine did not live with him as his mistress, but as his wife.

Ninth.—That the Court erred in holding that the cohabitation between them was originally meretricious, and that the same was not changed thereafter into a lawful and matrimonial cohabitation."

The importance of this question of the original character of the relationship between the parties is very apparent, and our opponents may well quail before the very trenchant and emphatic language of Mr. Justice Lacombe on this subject.

Courts sometimes find a presumption of marriage (in the absence of the possibility of more direct or positive evidence) from marital cohabitation, reputation and recognition, and infer that a marriage must have preceded such cohabitation where the whole environment and all the circumstances seem to point to that conclusion; but where the relation ship was originally meretricious, no such presumption or inference can be drawn. On the contrary, in the absence of proof on the subject, the relationship is presumed to continue as it commenced.

I quote a few of the multitude of judicial expressions on this subject:

> "Cohabitation and reputation alone are not marriage. They are simply circumstances from which a marriage may *sometimes* be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. *Here, the beginning was illicit*, and no subsequent marriage is clearly shown, and the illicit relations are presumed to continue."
>
> Appeal Reading Fire Insurance and Trust Co., 113 Pa., 204.

> "The presumption of marriage only arises from *matrimonial* cohabitation, where the parties not only lived together as man and wife but held themselves out to the world as sustaining that honorable relation to each other. *Mere illicit intercourse raises no presumption.*"
>
> Rose *v.* Clark, 8 Paige, 573.

> "To presume from the fact of cohabitation that there has been an actual marriage, *it*

must be matrimonial and be so begun and not illicit. It is not the fact alone that raises the presumption, but the character of the fact. The parties must not only live together as do man and wife, *but to become man and wife there must be a purpose in beginning so to live and* they must hold themselves out to the world as thus related, and the courts will not, by testimony that is not clear and explicit, that is not shown and supported by other circumstances nor by reputation of marriage that is divided, raise such a presumption, and the presumption is weakened where the relation of the parties is secret or concealed, unless an adequate or controlling motive is presented."

Brinckley *v.* Brinckley, 50 N. Y., 184, 197.

"The common law marriage is recognized in New York, but differs from marriage in *facie ecclesiae*, in that the latter is conclusive proof of the necessary consent, while in the former the proof of marriage may be rebutted by other testimony. Here, cohabitation, acknowledgment and reputation of marriage, reception as husband and wife, are characterized as secondary and presumptive marriage. It is admissible to show marriage and bigamy in a civil suit, but in this case the prior marriage is not shown. *The intercourse between the parties was in its commencement meretricious, and there is perhaps as much reason to believe that their subsequent connection was of the same character as that a marriage had, in fact, taken place. The presumption in favor of the legality of the connection is rebutted by the fact that it was at first illicit. The presumption then was that having been illicit in its origin, it was likely to continue so. If it was subsequently changed, at what time did it become lawful?"*

Clayton *v.* Waddell, 4 N. Y., 230.

" *A connection confessedly illicit in its inception is presumed to continue so.*"

Badger *v.* Badger, 88 N. Y., 546.

"The intercourse with plaintiff began illegally, *and is presumed so to continue*, and can be transformed only by an actual consent to marriage."

Foster *v.* Hawley, 8 Hun, 68.

"*And this intercourse having been begun illegally, is presumed so to continue.*"

Smith *v.* Smith, 4 Paige, 432.

"The repute could arise from marriage of 1843, and as such was *illicit. The cohabitation began meretriciously Has it changed to matrimonial?* That depends upon the intention of the parties, and as they did not know of the divorce, they could not have such intention. Courts cannot marry parties by mere presumption, without their consent. In the absence of consent, the status of marriage is never created by any government. The law compels no one to assume the matrimonial status. Without assent, no statute or constitution can create this status. After divorce, holding out Z as his wife is no proof of his changing his connection to her, to make it matrimonial. A concubine is often held out as a wife, to conceal relation and prevent criminal prosecution. *If cohabitation is meretricious in its origin, the presumption of morality and innocence of the parties is at once overcome.*"

Cartwright *v.* McGown, 121 Ill., 388.

"A marriage between the plaintiff's mother and D, in 1794, being proven, and D being alive in 1803, it is *prima facie* established that the plaintiff's mother was not lawfully married to C in 1803, and the onus of proving D had a former wife living in 1794, is on the plaintiff."

Gaines *v.* Relf, 12 Howard U. S., 472.

"When the connection was at first notoriously illicit, and a change in the character of the connection must be operated, and the

means employed for that purpose are such as to leave half the world in doubt as to the relations—one half thinking one way, and the other half, the other—at what time, in what circle could it be said that there was such a habit or repute as raised the presumption that the parties had mutually consented to be husband and wife? I cannot admit that mere cohabitation as man and woman is a cohabitation as a husband and wife."

Lord Elgin in Cunningham *v.* Cunningham, 2 Dow, P. C., 482.

"Where a particular status exists, the law will presume its continuance, and where it is asserted that it has been changed, some evidence of that fact must be produced. When the connection is illicit in its origin, the presumption is that it is likely to continue so, and if it is alleged that it was subsequently changed, it must be shown at what time it became lawful."

Cargile *v.* Wood, 63 Mo., 501.

"It is perfectly clear, and not contended to be otherwise, that an illicit connection between the parties commenced and continued for some time in North Carolina, before they removed to Arkansas. It was while this illicit connection existed that Dr. Barnum left North Carolina, taking Caroline Butler with him, she being then pregnant with child. They left North Carolina in 1837 and their illicit connection and cohabitation continued without intermission after their arrival in Arkansas. *This being so, it is incumbent upon those who set up subsequent marriage between the parties to show when and where it occurred.*"

Barnum *v.* Barnum, 42 Md., 291.

"The evidence establishes the fact that cohabitation had commenced when William Paul (the former husband of the woman) was living. The nature of that cohabitation was not altered by any undoubted and open act

> of the parties. There was no change in their demeanor after the period at which it is now believed he died: The cohabitation continued as at first, and the first cohabitation appears to have taken place at a time when William Paul was, in fact, alive, and when there was no reason to believe that he was dead. The rule, therefore, applies that the cohabitation was illegal from the commencement, and consequently there is no proof of a marriage between these parties, because at a subsequent period the disability to contract marriage between them had ceased."
>
> Opinion of the Lord Chancellor in Lapsley *v.* Grierson, 1 House of Lords Cases, 498.

If, therefore, the learned Judge in the Court below was justified by the evidence in coming to his conclusion, so clearly shown and so tersely expressed that "the intercourse was originally meretricious," he states a most emphatic, convincing and irresistible reason for his decree in favor of the defendants. Let us look at the evidence a little on this point.

Josephine, the alleged wife, was called as witness for the complainants. She was their main reliance, and, I suppose on the Scriptural principle of saving the best wine till the last, they did not call her until the afternoon of their last day, and closed their case with her. She is the only witness from whom any evidence whatever of an actual marriage was obtained.

This is her testimony (Vol. III, folio 4159):

> "5 Q. Were you ever married? A. Yes, sir.
> 6 Q. To whom? A. Blazius Moore Chesebrough.
> 7 Q. In what year? A. 1854.
> 8 Q. 1854? A. Yes, sir; 1854.
> 9 Q. Where? A. In Baltimore, Md.
> 10 Q. *Had anything previously occurred between you as to a marriage—before this time?*
> *A. Yes; I lived with him a short time before I was married to him.*"

On her cross-examination she gave us some further interesting particulars of her prematrimonial history (Vol. III, fols. 4173 to 4179):

"Cross-examined by Mr. Logan, for defendants:

1 x-Q. How many times were you ever in Baltimore? A. I don't know. several times.

2 x-Q. When was the first time you were ever in Baltimore? A. I forget; can't tell the date. The year 1854, I think. I am positive it was in 1854.

3 x-Q. What was the occasion of your first visit to Baltimore? A. My marriage.

4 x-Q. Did you go there for that purpose? A. Yes.

5 x-Q. What season of the year was it? A. I think it was spring or summer.

6 x-Q. How did you go? A. We went in a carriage.

7 x-Q. From where? A. From 16 Bond street, New York City.

8 x-Q. You drove all the way to Baltimore in a carriage? A. Yes, sir.

9 x-Q. Did you have any lady companion? A. No, sir.

10 x-Q. How many days were you on the journey? A. I don't remember—two or three.

11 x-Q. Where did you pass the nights during that time? A. At different places. I don't remember.

12 x-Q. Can you remember any of the places? A. No; I cannot.

13 x-Q. Did you pass the nights at hotels? A. I don't know—can't remember.

14 x-Q. You must have slept somewhere? A. Of course we stopped at different houses, but whether they were hotels or not, I can't remember that.

15 x-Q. I am now speaking of your journey from New York to Baltimore? A. I understand.

16 x-Q. You, during that journey, spent the nights at houses on the road with Mr. Chesebrough? A. Yes.

17 x-Q. *Did you occupy the same room with him? A. I did.*

18 x-Q. *Did you pass yourself off as husband and wife during that journey? A. Yes.*

19 x-Q. What was this place, No. 16 Bond street, from which you started? A. A dancing academy and boarding house. Sirocco, his name was—Prof. Sirocco.

20 x-Q. *Was it Mr. Chesebrough's residence at that time? A. Yes.*

21 x-Q. *You had been living there with him?* A. *Yes, sir.*

22 x-Q. *You had passed yourself off there as husband and wife?* A. *Yes.*

23 x-Q. What time in the day was it that you left 16 Bond street? A. I can't remember the time of day.

24 x-Q. *When you arrived in Baltimore where did you go?* A. *To a hotel. I think it was Barnum's Hotel.*

25 x-Q. *Drove directly to Barnum's Hotel?* A. *Yes.*

26 x-Q. *That was the first place at which you stopped in Baltimore?* A. *Yes.*

27 x-Q. *Did you take a room the first thing when you arrived there?* A. *Yes.*

28 x-Q. *You and Mr. Chesebrough took a room together?* A. *Yes.*

29 x-Q. *Upon your first arrival there did you pass yourselves off as husband and wife at that hotel?* A. *At the hotel, yes.*

30 x-Q. How long did you stay in Baltimore? A. A day or two. I don't recollect the time.

31 x-Q. Did you see any acquaintances during your stay in Baltimore except Mr. Chesebrough? A. No, sir.

32 x-Q. When you left Baltimore where did you go? A. Came back to New York.

33 x-Q. Drive back? A. I am not positive —can't remember.

34 x-Q. *During your stay in Baltimore did you stay, all the time, at the same hotel?* A. *Yes.*

35 x-Q. *Did you occupy the same room, at that hotel, during all your stay?* A. *Yes; the same room we took when we first went there."*

The wedding journey is a quite well-established Anglo-Saxon institution. There is a good deal of

logic in it, and it seems to have developed and survived on account of its fitness. The two people who are just starting in life together withdraw themselves for a few weeks from the rest of the world, and partake of their new-found joys and become accustomed to their new relationship and their new environment all by themselves. But the Anglo-Saxon institution of the wedding journey takes place after marriage. Josephine and Blazius seem to have taken theirs before marriage. The difference between their kind of wedding trip and the other kind is simply the difference between vice and virtue.

A wedding trip of several days *before* marriage, during which the parties occupy the same room and bed, and cohabit together as man and wife, would seem to establish pretty clearly the meretricious origin of the relationship.

Subsequently we called this same witness for further cross-examination (Vol. VII, fols. 805 to 812). She testified:

> "Examined by Mr. Logan:
>
> Q. What is your name? A. Josephine Cregier.
>
> Q. Are you the same person who formerly testified in this case under the name of Josephine Chesebrough? A. I am.
>
> Q. Were you ever married? A. No, sir.
>
> Q. Was the statement you made, on your former examination, that you were married to Blazius M. Chesebrough, and that he was your husband, correct? A. No, sir.
>
> Q. Was there ever any marriage ceremony or marriage agreement between you and Blazius M. Chesebrough? A. No, sir.
>
> Q. Was anything ever said between you on the subject of marriage? A. Nothing more than he promised, after his mother's death, to marry me.
>
> Q. Do you mean that the promise was made after his mother's death? A. No, sir; before his mother's death.
>
> Q. Did he tell you or promise you when he

would marry you? A. Not till after his mother's death.

Q. Did you ever see him after his mother's death? A. No, sir.

Q. Did you ever visit Philadelphia, or any place, in company with Blazius M. Chesebrough, and a child? A. No, sir.

Q. Did you ever, at any time, during the lifetime of Blazius M. Chesebrough, consider yourself or believe yourself to be his wife? A. No, sir."

Further testifying on the same occasion (Vol VII, fols. 913 to 928), she says:

"Q. What did you mean, when you said in answer to Mr. Arnold's question, that you lived with Mr. Chesebrough as his wife? A. Well, I was obliged to take his name or I could not live in a respectable boarding house; I knew and he knew that I was not his wife.

Q. Do you remember the occasion when you first stayed with him or commenced to live with him? A. Yes, sir.

Q. Where was it? A. No. 16 Bond street, New York City.

Q. Did Mr. Chesebrough have his room there, at that time? A. Yes, he did.

Q. And was there also in the same building a dancing school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the first time, where did you go from? A. From the hall down-stairs—the dancing hall.

Q. Had you ever met him before except at the dancing school? A. No; that is the first place I met him at.

Q. Had you ever met him before, outside of the dancing school, before the time you first went to his room? A. No, sir.

Q. What time in the day was it? A. I don't remember whether day or night. I think it was night.

Q. Did you spend the night with him at his room, at that time? A. Yes.

Q. Did you go to his room for the purpose

of spending the night, or staying with him? A. Yes.

Q. From what time did you commence to live with him? A. Six weeks or a couple of months after that night, after the first night that I slept there, as near as I can recollect.

Q. Where did you pass the time during those six weeks or two months? A. At home, at my mother's.

Q. At the time that you commenced to live with him, where did you live with him? A. 16 Bond street, the same place.

Q. At the time you commenced to live with him—some six weeks or two months after the night you first stayed with him—had anything been said between you on the subject of marriage? A. No, sir.

Q. How long after that, if ever, was that subject spoken of? A. Some time after that. I can't remember, exactly. He made a promise that he would marry me after his mother's death, and that was all that was said between us, as near as I can recollect; it was a long time ago.

* * *

Q. Did you at any time, while living with Mr. Chesebrough, consider yourself his wife, or believe yourself to be his wife? A. No, sir.

Q. So far as you know, did he at any time consider himself to be your husband, or believe himself to be your husband? A. No, sir.

Q. Was there ever, at any time, any change in the relationship between you from the time you first visited his room, as you have mentioned, till the time you ceased to live with him? A. No.

Q. Did you ever use the name of Chesebrough as your own name, or call yourself Mrs. Chesebrough, from the time you left Mr. Chesebrough, as you have stated, up to the time you were called upon in Nashville, by the complainant, as you have testified, and her husband? A. Not to my recollection."

It may be said that this witness testifies to irreconcilable and contradictory statements on the question of marriage, and therefore is not to be believed.

To this we answer:

1. It is true, that on the question of marriage, she testified the last time that she was called that her first testimony that she had been married was incorrect, and that there never had been any marriage, or anything in the nature of a marriage, between her and Mr. Chesebrough; but on the subject of the meretriciousness of the connection, at its origin, whatever it may have been afterwards, her testimony is consistent all the way through. She testifies to its vicious beginning just as strongly when she is called the first time by them, and is testifying in answer to their questions, as she does when she is subsequently called and examined by us. The one statement, as to which she has been consistent from the beginning to the end, under all circumstances, and no matter how or when questioned about it, or by whom examined, is that her first relationship to Mr. Chesebrough was as his mistress, and not as his wife; and that their life, at No. 16 Bond street, where this relationship commenced, was altogether vicious and meretricious.

2. It will not do for the appellants to attempt too much to break down the credit of this witness. Her testimony is the only evidence of a marriage in the whole case, and if she is not to be credited when she confessed that their relationship was meretricious in its commencement, she certainly could not have been credited when she said that there was a subsequent marriage, even if she had not appeared the second time upon the witness stand and confessed to the error of her first testimony, so far as it related to a marriage.

But the testimony of Josephine as to the original meretriciousness of her relationship to Mr. Chesebrough does not stand uncorroborated and unconfirmed. Mr. Frederick W. Geisenheimer, a witness about whose character and respectability there can be no possible question, testifies (Vol. VI, fols. 983 to 988):

First, in answer to Mr. Arnold's questions:

"Q. Did you ever speak to Blazius M. Cheesebrough himself, about his being married? A. I can answer that both ways—yes, I have, when he was at the house at Dey street in 1854.

Q. Any other time? A. Yes, not long after that. I went with him in a wagon, and there was a young lady along. I asked who she was, and he said it was a young lady he had. I asked him if he was married to her and he said no. From what he said, I knew who the young lady was. He introduced me to her as Miss Josephine, and he then insisted on my going with him, and put me and her in the hind seat and himself and boy in the front, and took us over towards New Brunswick. I got away from him when we got to Newark. This was in 1851; I should judge in May or June. It was pretty warm." (There is no marriage claimed before August of that year.)

I went up to his rooms in the hotel on the second floor; I think it was the Dey street house. It wasn't very far from Cortlandt street ferry, and we crossed there. I saw the lady in the room there. I am under the impression that I saw her again with him in Broadway, am not sure if at Florence's, in the neighborhood of Houston and Broadway. They were standing as I passed. I merely nodded; didn't stop to talk. That was in the same year. That is the last I saw her, to my recollection.

Redirect by Mr. Logan:

Q. Did Blazius M. Chesebrough and this young lady appear to be living together, at the Dey Street Hotel, in those rooms, as you saw them? A. I was led to believe so. The impression was made on my mind.

Q. How long were you at the rooms? A. Maybe, perhaps, the best part of an hour.

Q. Did you go directly from there, on this ride in New Jersey? A. Yes.

Q. Was she dressed for riding, when you first went in? A. No., sir.

Q. How was she dressed? A In ordinary dress.

Q. When you started on the ride, did she dress for the ride? A. Put on some wrap and her bonnet.

Q. How many rooms were there? A. Only the one large room. You might call it a sitting room. It had a bed in it.

Q. Could you see anything about it to indicate that it was the home of this young lady? A. All I can say is, that the bed had been used, and clothes lay upon it, and they were packing them up to go away.

Q. Were they packing their clothes, together? A. I can't tell if there was only one satchel. In addition he had a theatrical trunk or valise, or what you might call an old-fashioned wooden valise.

Recross-examination by Mr. Arnold, fols. 996 to 997:

Q. In respect to the Dey street house episode, did you have the conversation as to his marriage, you spoke of, with Blazius, in the rooms? A. I said that took place some little while after, about five or six weeks after, to the best of my recollection. I met him and asked him.

Q. Did you go right up into the rooms, when you reached the house? A. Yes; I was in the lower part and he came out and called me, 'Come up, Fred.'

Q. And took you in the room? A. He expected me to come. I had met him earlier in the day, and he had asked me to take a ride to New Brunswick.

Q. You sent in your name? A. Told the boy.

Q. Did the lady make the additions to her apparel while you were there? A. That is more than I can say. I think she did. I went out in the entry and called the boy that had charge of the horses, and I was not there all the time. I think he was in the room all the time; except to and fro from the entry. He was in and out.

It is quite evident from this testimony that Blazius M. Chesebrough was living, in May or June, 1854, in a meretricous manner with a young woman by the name of Josephine. It may be ob-

jected that the identity of this young woman with Josephine Cregier is not established. It is true that he *may* have had, at about the same time, two mistresses by the name of Josephine, but it is hardly probable, and I think the fair presumption is that the Josephine who lived with him meretriciously at 16 Bond street and the Josephine who lived with him meretriciously in this Dey street house, were one and the same person. But even if their identity was not established, we should have the fact that he was living with some mistress, not more than two months before his alleged marriage with Josephine Cregier. It would certainly indicate that he was not addicted to matrimonial tastes or habits.

Mr. Charles A. Chesebrough, brother of Blazius, testifies (Vol. II, fols. 2775 to 2778):

> " By Mr. Logan:
>
> 1 x-Q. Mr. Chesebrough, did you ever see Josephine Cregier? A. Yes, sir; I saw her once.
>
> 2 x-Q. State when and where and under what circumstances, and all that took place. A. Well, I saw her once; if my memory serves me, it was Broadway at all events, and I think the corner of Broome street, on the southwest corner at all events of Broadway. I had been—I was in the habit of calling down to my mother's house, down in 33 Howard street, about three times a week, and the old Baron used to be there very often (the person described as 'The Baron' was a servant of Blazius, whose name appears very frequently in the case), and on one occasion, when I went there, the old Baron was there. I inquired about the brother, where he lived. He said he was living there, up Broadway, and I said I would like to see him and he said he would go up there with me. He said I would find a Miss there. 'A Miss,' says I. 'What,' he says, 'he has got a Miss, a danseuse. He has got one there, a little danseuse.' Something of that kind. I forget the exact words; that is about the words, I think, he told me. So him

and me went up there, and went upstairs, and went into a room. I went into one room, and we went across from one room. The dining-room stood on the other side, and he introduced me to this young lady. He says, 'This is Mr. Chesebrough's brother;' he says, and then he says to me, "This is Josephine, the little danseuse,' to me he says. She was taking breakfast at the time, and the brother–I didn't see whether he was abed or not; I suppose he was abed, and wasn't up yet. I didn't stay a great while. Had a few minutes' conversation. I don't know what it was – kind of casual conversation, but it wasn't any amount, and that is the only time that I recollect of seeing her, to my knowledge. I give you the whole of it, just as it occurred.

That was, I think, in the year 1854. I am pretty positive 1853 or 1854. 1854; I know it by the circumstance that I had a French gardener hired, and I only had him a year anyhow, and I discharged him in 1855—the fore part, so I know by that."

This is when Mr. Chesebrough was testifying as a witness for the complainants. He testifies later to the same circumstances, when called as a witness for us (Vol. VII, fols. 1026 to 1030).

It is evident that the relation of Blazius to this "Miss Josephine" was not matrimonial, and unless we are prepared to adopt the rather improbable theory that he had two mistresses by the name of Josephine, at about the same time, he was, at the time of Mr. Charles A. Chesebrough's call, living meretriciously with Josephine Cregier.

At any rate, there doesn't seem to have been much of a matrimonial aurora about the head of Blazius M. Chesebrough, near the time of his alleged marriage with Josephine.

But for the strongest corroboration of Josephine's testimony as to the meretriciousness of the original relationship between her and Blazius, we are not obliged to depend upon the uncertain memory, or possibly warped or biased judgment, of witnesses testifying orally.

We have a record, a solid, substantial and enduring rock, against which the waves of time may beat without danger of its destruction or without possibility of changing its form or character.

In 1859, after the relationship between Blazius and Josephine had entirely ceased, after she had seen him for the last time, after she had left New York not to return until some years after his death, Rachel Cregier, her mother, commences a suit against Mr. Chesebrough in the Superior Court of the City of New York. A defence is interposed. The case comes on for trial before Mr. Justice Lewis B. Woodward and a jury, and a verdict is rendered for Mrs. Creiger, a judgment entered, and the judgment is paid and satisfied. All this appears from the files of the Superior Court, and the record is set forth in full in the printed proofs in this case (Vol. IX, fols. 25 to 78, and fols. 778 to 1251).

This was an action for seduction, brought by Rachel Cregier against Mr. Blazius M. Chesebrough (sued under the name of George M. Chesebrough), and the cause of action alleged is the damages which she, as a mother, suffered for the loss of the services of her child, Josephine, by reason of seduction, *and the fruit of the seduction is alleged to be the birth of the daughter, Leonora.*

The complaint is as follows (Vol. IX, fols. 31 to 39):

"SUPERIOR COURT

OF THE CITY OF NEW YORK.

RACHEL CREGIER,

Plaintiff,

against

GEORGE M. CHESEBROUH,

Defendant.

The complaint of the plaintiff shows unto the Court:

For a first cause of action, the plaintiff says that the defendant, contriving and wrongfully and unjustly intending to injure the said plaintiff, and to deprive her of the service and assistance of Josephine Cregier, the daughter and servant of this plaintiff, heretofore, to wit, on or about the first day of April, 1853, and on divers other days and times between that day and the sixteenth day of November, 1857, at the City of New York, *debauched and carnally knew the said Josephine Cregier*, the daughter and servant of this plaintiff; that by reason thereof, she, the said Josephine, for a long space of time, to wit, during the period above mentioned, became and was unable to do or perform the neccessary affairs and business of this plaintiff, so being her mother as aforesaid, and thereby the said plaintiff, during all that time, lost and was deprived, to a great extent, of the service of her, said daughter and servant.

Plaintiff further says, on information and belief, that by reason aforesaid, and on or about *the ninth day of January, 1857*, the said Josephine Cregier became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for about the space of nine months, then next follow-

ing, at the expiration, whereof, to wit, on the *ninth day of October, 1857*, she, the said Josephine, was delivered of the child with which she was so pregnant as aforesaid; that by reason thereof this plaintiff was deprived, in part, of the services of her said daughter, during the small portion of said last mentioned period that she remained in the family of this plaintiff. That plaintiff was put to trouble and expense in and about the delivery of said child. Wherefore, the plaintiff says that she is injured and hath sustained damages to the amount of five thousand dollars.

For a second cause of action the plaintiff says that the defendant, on or about the fifteenth day of July, 1856, and on divers other days during said year, with force and arms assaulted the said Josephine, the daughter of this plaintiff, to wit, at the City of New York, and then and there beat and kicked and ill-treated the said Josephine; that by means thereof, the said Josephine became and was sick, sore and disordered, and so remained and continued for a long space of time, whereby the plaintiff lost and was deprived of the service of her said daugnter and servant to the damage of this plaintiff in the sum of two thousand dollars.

For a third cause of action against the defendant the plaintiff says, on information and belief, that the defendant, on or about the first day of October 1855, wrongfully and unjustly enticed, persuaded and procured the said Josephine to depart from the house of the plaintiff, and to remain absent therefrom for the space of about two months; whereby the plaintiff lost the service, society and assistance of the said Josephine, to the damage of plaintiff, in the sum of one thousand dollars.

Plaintiff further says, that she is the sole surviving parent of the said Josephine, her father, the husband of this plaintiff having been dead some years, at the time of the commencement of the acts by the defendant, hereinbefore set forth, and that said Josephine was not, up to the time of the birth of said child, twenty-one years of age.

Plaintiff further says, that she was, at the time of the committing of said acts by the defendant, in the actual receipt of services from the said Josephine, her daughter as aforesaid.

Wherefore, plaintiff demands judgment for damages against defendant for said several sums, amounting together to the sum of eight thousand dollars, besides the costs of this action.

S. B. BRAGUE,
Plaintiff's Attorney."

The action was commenced February 3d, 1859 (fol. 29). It was tried March 18, 1861 (fols. 44–45), and a verdict rendered for the plaintiff for $2,500. An order was made May 4th, 1861, on motion of the plaintiff, correcting the judgment and all the proceedings, by substituting the defendant's correct name, Blazius M. Chesebrough, for the name George M. Chesebrough, under which he was sued (fols. 61 to 65), and later the judgment is satisfied (fols. 76 to 78).

On the trial of the action, the witnesses called are Mrs. Rachel Cregier, the mother of Josephine; Almira Cregier, her sister, who lived at home with her mother, and Dr. William Groves, the physician who attended Josephine at the time of the birth of Leonora (Vol. IX, fol. 74; Vol. VIII, fol. 35), and the testimony was clear and conclusive that the relationship between Blazius and Josephine was meretricious and unlawful, that there had been no marriage, and that Leonora, the present complainant, was a child of sin and shame (Vol. VIII, fols. 1 to 214).

The case was a somewhat historic one, and before it was through a good part of the bar of New York seem to have been employed in it, on one side or the other (Vol. IX, fols. 778 to 1187). Somewhat lengthy and complicated proceedings were had after the judgment, before Mr. Orasmus Bushnell, as Referee (fols. 778 to 1133), in which Mrs. Cregier herself, her daughter Almira, Mr. Stephen B.

Brague, the attorney of record, and several other attorneys, were examined, and the testimony given on the trial is, so far as it is pertinent to the inquiry then before the Referee reiterated and confirmed.

Some of this record was introduced in evidence by us, some by our opponents, and although objection was taken to its introduction, Mr. Justice Lacombe holds that it is admissible, and no exception is taken to his ruling, and no assignment of error founded upon it (Vol. IX, fols. 1297–1304).

Mr. Justice Lacombe says, in relation to it:

> "Rachel Cregier is deceased, but it appears that in 1859 she brought a suit in the Superior Court for the seduction of Josephine against Blazius, alleging that the connection between them continued between April 1 1853, and November 16, 1857, and that complainant was born October 9, 1857, as the result of such unlawful connection; and further, that about October 1, 1855, he enticed Josephine away from her mother's house, and kept her away two months. The case was tried on inquest, before Judge Woodruff and a jury; Mrs. Cregier and the sister, Almira, were examined as witnesses, and there was a verdict for the plaintiff therein of $2,500 (which was subsequently paid). In view of this piece of record evidence it is difficult to see how it can be contended that there was a reputation of marriage in the Cregier family. Certainly no declarations of Rachel to that effect, nor any testimony as to the belief of others, whose information was derived from her are entitled to much weight. She might have sought to save her daughter's reputation, among other members of the family, by saying she was married, but it must be assumed that she stated what she believed to be the truth when she brought the suit and testified on the trial. The complainant objected to the admission of the record and judgment roll in this seduction suit. It is well settled that in cases of pedigree, family conduct is admissible evidence from which the opinion and belief of the family may be

> inferred. The judgment-roll may fairly be considered competent evidence of family conduct; but if it be not, and if all evidence of the declarations of Rachel Cregier were excluded from the case as hearsay, then there would be left practically no evidence of repute in the Cregier family, except that given by Almira Sisson, which, as she was of such tender age at the time, is certainly of but little weight."

In the light of Josephine's testimony, corroborated as it is in some degree at least by the testimony of Mr. Geissenheimer and Mr. Charles A. Chesebrough, and corroborated as it is in the very highest degree by the record of this suit in the Superior Court, and by the testimony given upon the trial thereof, and of the subsequent proceedings before Mr. Bushnell, as Referee, it is difficult to see how an argument can be made to sustain the proposition that the Court was in error in holding that the original relationship between these parties was meretricious.

IV.

The Court did not err in the conclusion that "Blazius M. Chesebrough and Josephine Cregier were not husband and wife."

Mr. Justice Lacombe, in his opinion (Vol. IX, fols. 1261–1267), says:

> "Marriage may be proved by circumstantial evidence, by proof of the acts and declarations of the parties, of their cohabitation as husband and wife, holding themselves out to the world as sustaining that honorable relation to each other. But neither such a course of life nor such declarations *make* a

marriage. nor do they even directly or affirmatively establish it. They may, if satisfactorily proved, and sufficiently strong, be legitimate ground for inferring that there has been a valid marriage—a contract—that is (with or without any ceremony), whereby at some time and place the parties agree together per *verba de presenti* to be husband and wife, following that agreement by cohabitation as such. Whoever asserts a marriage as the basis of a claim at law or equity must satisfy the Court, upon the whole case, by a fair preponderance of proof—not necessarily where and when such contract was made—but that at some time and place it was made. If it is sought to prove that fact by circumstantial evidence, the triers of the fact must first determine what circumstances are fairly proved, and then decide whether all those circumstances, taken together, constrain the mind to accept the inference that such contract was made.

Blazius M. Chesebrough, who claimed to have purchased a title of nobility in Austria, and liked to be known as 'Count,' is described, truthfully enough, by counsel as a very eccentric man, bombastic, pompous and extravagant; but this by no means completes his picture. He was under no restraint, self-imposed or otherwise, absolutely selfish, seeking pleasure in the constant gratification of his sensual appetites, reckless, roystering, dissipated, rarely completely sober, a frequenter of bawdy houses, a bad son, a mere brute when inflamed with drink, and yet contemplating himself and his position in the community with a self-complacent conceit, which esteemed 'Count' Chesebrough as something superior to mere common clay.

In 1854, when he first encountered Josephine Cregier (though some testimony would make the date 1853), he was about thirty-five years of age and she was sixteen. They met at Sirocco's dancing rooms in Bond street, (Blazius having apartments in the same building), and that same night she shared his bed. Shortly thereafter she left her mother's home, and lived with him in Bond street and elsewhere, and the testimony is uncontra-

dicted that for weeks certainly, probably for months, they maintained a meretricious connection. It is contended by the complainant that subsequently, in 1854, they were married in the City of Baltimore, whither they made a trip for that express purpose, and Josephine herself, testifying for the complainant, gave direct evidence to that effect. Subsequently, when called by the defendants, she retracted her former statement, and testified that she was never married to Blazius M. Chesebrough in Baltimore or elsewhere. If her later testimony were to be accepted, there need be no further enquiry. Certainly, in view of her admitted perjury, complainant cannot insist that her testimony affords direct proof of a marriage. If her evidence both ways on that point be disregarded, such proof can only be found, if at all, as a necessary and natural inference from all such circumstances as are established by the testimony of credible witnesses.

To discuss at length this testimony, extremely voluminous, and a large part of it taken under exception, is wholly unnecessary. The point to be decided is purely a question of fact. The conclusion reached after consideration of a multitude of circumstances, peculiar to the case, would be of no value as a precedent in other cases where the circumstances were not identical. It will be enough therefore to indicate, with great brevity, some of the reasons which lead to *the conclusion that Blazius M. Chesebrough and Josephine Cregier were not husband and wife.*"

The defendants have made the following assignments of error upon this question:

"*First.*—That the Court erred in holding that the testimony in this case is not sufficiently strong to and does not constrain the mind to accept it as a natural inference that Blazius M. Chesebrough and Josephine Cregier, the father and mother of the complainant, Leonora A. Arnold, were ever married.

Second.—That the Court erred in not holding that the testimony in this case is sufficiently strong to and does constrain the mind to accept it as a natural inference that they were married.

Third.—That the Court erred in holding that the evidence in this case does not establish that they were married.

Fourth.—That this Court erred in not holding that the evidence in this case does establish that they were married.

Fifth.—That the Court erred in holding that they were not married.

Sixth.—That the Court erred in not holding that they were married."

These assignments of error are to be noted as much for what they omit as for what they contain. It is not claimed that there was any error committed by the Court below in the admission or rejection of evidence. It is not claimed that the rules of law were improperly applied to this evidence. All the contention of the appellants appears to be simply that the mind of the learned Judge below was so improperly or illogically affected by the evidence in the case that he reached an erroneous conclusion therefrom as to the facts in controversy, and that this court, upon the same evidence, and applying the same rules of law, in the same way, should reach a conclusion that there was a marriage, in the place of the conclusion which Mr. Justice Lacombe reached that there was not.

It will be my easy and pleasant task in my succeeding points to show that the learned Judge of the Circuit Court did not misinterpret or misjudge the evidence before him.

V.

The complainants have the burden of proof.

Mr. Justice Lacombe states the proposition in the following language (Vol. IX, fols. 1259 to 1261):

> "It is not disputed, upon the proofs, that the complainant's mother is Josephine, a daughter of Mrs. Rachel Cregier, nor that her father was Blasius M. Chesebrough. It appears that she was born (October 8, 1857) in the house of her grandmother (Mrs. Cregier), in this city, and that for several years prior thereto her father and mother lived together as man and wife, in hotels, in boarding houses, in apartments, and also at her grandmother's. It is essential to the complainant's case, however, that the fact of a marriage between her father and mother should be shown by competent evidence to the satisfaction of the Court. The question to be determined is a question of fact, to be settled upon a consideration of *all* the competent and relevant evidence in the case; it is a fact, which, at the close of the case, the complainant must show to be established by a fair preponderance of proof. As the evidence is being put in, the weight in either scale may vary and much preponderance may shift from side to side, but the burden of proof which the complainant assumed when she filed her bill, she must show herself able to sustain, when the case is closed, or she has failed. There is no presumption of law in such a case (Blackburn *v.* Crawford, 3 Wall., 186). Such presumptions of fact, or rather such unproved inferences from proved circumstances as human experience will warrant the trier of the facts in drawing, may constantly vary, may be of greater or less force, controlling of the final decision or of no effect thereon, just as there may be change in the number and character of those proved facts from which it is sought to draw the inferences; and the final conclusion must be

drawn with a due regard to the entire body of competent and material proof."

No exception is taken and no error assigned as to this holding of the learned Judge below, and the rule of law, as laid down by him, cannot, therefore, be assailed in this Court (U. S. Rev. Stat., Sec. 997, Rule 11 of U. S. Circuit Court of Appeals for the 2d Circuit).

The appellants do well in not attacking, in this Court, the rule of law on this subject laid down by Mr. Justice Lacombe in the Court below, for it is too well settled to admit of question.

> "The burden of maintaining the affirmative of the issue is always on the party alleging it."
>
> Heineman *v.* Heard, 62 N. Y., 448.
> Lamb *v.* Camden and Amboy R. R. Co., 46 N. Y., 271.
> Manning *v.* Insurance Co., 100 U. S., 693.
> U. S. *v.* Ross, 92 U. S., 281.
> Gaines *v.* Relf, 12 How. U. S., 472.
> Hale *v.* Smith, 78 N. Y.. 480.
> Green *v.* Waggoner, 2 Hilton, 297.
> Costigan *v.* Mohawk and Hudson R. R. Co., 2 Denio, 609.
> Blackburn *v.* Crawford, 3 Wallace, 175.

If there was otherwise any doubt as to the proposition, the case of Blackburn *v.* Crawford, quoted by Mr. Justice Lacombe and cited above, would settle the question in this Court.

This is a decision of the Supreme Court of the United States, made in December, 1865. The question was one of marriage and legitimacy, as in this case. The evidence as to the cohabitation of the parties was *very* much stronger than in this case. There was a general reputation of marriage in that case, as there was not in this case, and there was a

very much higher degree of recognition in every way of the woman as the man's wife than in this case. In every respect the evidence was very much stronger in favor of the marriage than it is in our case, even under the most favorable construction that our opponents can put upon it.

The Court in that case charged:

> "3. And if the jury shall find that at any time Mr. Crawford and Elizabeth Taylor lived together as man and wife; that he acknowledged that she was his wife, and always treated her as such, and the children which she bore during that time as his children, and permitted them to be called by his name, then the presumption of law is in favor of the legitimacy of said children."

The Supreme Court reversed the judgment, and in reference to this portion of the charge, says:

> "The third of these charges is liable to a further objection. It instructed the jury that if the facts were as there stated, 'the presumption of law was in favor of the legitimacy of the children.' *Under such circumstances the law makes no presumption. The question to be determined was one of fact and not of law.* The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might, by possibility, all be true, and yet no marriage have occurred, and the children all be illegitimate."

The learned and accomplished reporter (Mr. Wallace), who so long and so well performed the difficult duties of reporter for the Supreme Court of the United States, in the head notes of this case, very clearly and accurately states the principle of the decision:

> "It is error to instruct a jury that if a man and woman live together as husband and wife, and the man acknowledge the woman as his wife, and always treats her as such,

> and acknowledges and treats the children which she bore him as his children, and permits them to be called by his name, then that *the presumption of law* is in favor of their legitimacy. *The question of legitimacy, under such circumstances, is a question for the jury; the law making no presumptions about it.*"

This decision of the Supreme Court of the United States in the case of Blackburn *v.* Crawford is in harmony with the general trend of the decisions of the Courts of the United States and of the different States, including the State of New York.

The case of Holmes *v.* Holmes, 1 Abb. U. S., 525, a decision of the United States Circuit Court for the Ninth Circuit, is a similar case, and a direct authority upon the proposition I am now discussing.

The plaintiff claimed dower against the heirs of the deceased. The marriage was denied. She had lived with the deceased two years, was introduced to the tradesmen as Mrs. Holmes, and lived in the deceased's own house. It was an equity case. The Court held:

> " Living with the deceased however long, or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription or copulation, either singly or combined, can never constitute marriage. The case does not involve the status or rights of third parties. Plaintiff claims dower as being deceased's wife. *The burden of proof is upon her to show this fact, and it is not sufficient to show that there might have been a marriage. She must prove this fact directly from the evidence*, and by those who witnessed the contract, or by such an array of circumstances as admits of no other reasonable conclusion. It must also be a lawful marriage, contracted or celebrated according to the law of the land."

The decision of the Supreme Court of the State of Illinois in the case of Cartwright *v.* McGown, 125 Ill., 388, is to the like effect.

The question here was whether the children of L, deceased, were legitimate.

He was married to their mother Z in 1843. He was married before that to S, who was divorced from him three years after the second marriage. The question was as to *presuming a marriage* to the second wife after this divorce. There was no direct evidence of any contract. The Court say:

> " The repute could arise from marriage of 1843, and as such was illicit. The cohabitation began meretriciously; has it changed to matrimonial? This depends upon the intention of the parties, and as they did not know of the divorce, they could not have had such intention. *Courts cannot marry parties by mere presumption without their consent. In the absence of consent the status of marriage is never created by any government. The law compels no one to assume the matrimonial status. Without assent no statute or constitution can create this relation.* After divorce, holding out Z as his wife is no proof of his changing his connection to her to make it matrimonial. *A concubine is often held out to the world as a wife to conceal an illicit cohabitation and prevent a criminal prosecution. If cohabitation was in its inception illicit, the presumption of the innocence and morality of the parties is at once rebutted and overcome.*
>
> When both parties are married in the honest belief that they can marry legally, when they cannot, on the removal of the impediment, a marriage will be presumed, if the cohabitation began in ignorance, and hence was not meretricious in its origin. Here it was meretricious as to him, though not as to her, who did not know he had a former wife, and she is not liable criminally, but he could not contract marriage in 1843, and hence was not bound by it, and therefore she cannot be. A contract must be mutual."

Bolerman *v.* **Blake, 24 Hun, 187,** a decision of the Supreme Court of the State of New York, is to the same effect.

The only evidence of legitimacy was cohabitation, and the birth of seven children. After this the parents were formally married. The Court said:

> "These facts do not warrant an inference of legitimacy, as parents in ceremonial marriage expressed a desire to legitimatize their children." * * * * * * "We cannot presume a marriage without proof, and from that alone presume the legitimacy of the children or *vice versa*. One presumption will not aid the other. *Plaintiff, to inherit, must show descent; to do that, he must show a marriage of his parents before he was born. No authority is offered to show that marriage or legitimacy can be established by presumptions alone without proof of facts showing a mutual interchange of consent.*"

The same Court, in Wright *v.* Wright, 48 How. Pr., 1, the same point being raised, holds:

> "As long as the law requires a marriage in order to make children legitimate, I do not think the courts have the right to perform the ceremony or make the contract of marriage for the parties where the probabilities all tend to show that the connection has been meretricious. My sympathies are with the plaintiff to make them legitimate children, but—Judgment for defendant."

Foster *v.* Hawley, 8 Hun., 68, is to the same effect.

The husband was married, and then cohabited with plaintiff until after he got a divorce from his wife. The Court say:

> "There was no marriage with the plaintiff unless a contract *after the divorce* is shown. The intercourse with plaintiff began illegally, *and is presumed so to continue*, and can be transformed only by an actual consent to marriage."

The Courts of New Jersey follow the same rule.

In Goldbeck *v.* Goldbeck, 18 N. J. Eq., 42, the Court, speaking of a New York marriage by contract *in verba de presenti*, say:

> "Where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife will not prove marriage. It is necessary that a contract, consented to by both parties, should be in some way shown."

Even if there was a conflict between the different courts, the decision in Blackburn *v.* Crawford would be absolutely controlling here.

While it is true that, so far as the question of what constitutes a marriage is concerned—that is, what are the *essentials* of the contract, the courts of the United States will enforce the law of the State in which the contract was made, yet, so far as regards *evidence* of the contract, they will be governed by the statutes and decisions of the courts of the United States.

The complainant having chosen the United States Court as the tribunal to which she appeals, to enforce her supposed rights, she must prove her case according to the practice and the rules of evidence which have been established by the statutes and courts of the United States.

On all questions of evidence the decisions of the Supreme Court of the United States are binding upon this Court.

Neves *v.* Scott, 13 How., 268.
Russell *v.* Southard, 12 How., 139.

The case of Russell *v.* Southard, *supra*, was a bill in equity to redeem a so-called mortgage. The question was whether the instrument in question was a mortgage or a conditional sale. One of the arguments was that the Kentucky courts (where the deed was given and the property was) did not

admit oral evidence to contradict or vary the terms of the deed. Curtis, *J.*, says:

> "If this *is* so, the Court is not bound thereby, this being a suit in equity, and oral evidence being admitted or rejected, not by the mere force of any State statute, but upon the principles of general equity and jurisprudence, and this Court must be governed by its own views of those principles."

The statutes of the United States in relation to the admission of evidence, and its probative force and effect, are very often at variance with the statutes of the several States, and the decisions of the courts of the United States upon such questions are often in conflict with the decisions of the courts of the States, but the courts of the United States are always bound by the statutes of the United States and by their own decisions, and must reject the State statutes and the State court decisons upon all questions of evidence when the two are in conflict.

I have cited these cases at some length, for the reason that our opponents in the court below seemed to rely a great deal upon the opinion in some New York cases, from which they tried to spell out a different rule. The language of the cases, when analyzed, was, however, not found to be favorable to them, and I judge, from the fact that they have assigned no error upon this point, that they have abandoned it, and I, perhaps, might have passed it over in silence.

VI.

The evolution of the perjury.

I have quoted and referred to, under a previous point, the evidence which led the learned Mr. Justice Lacombe, in his opinion, to say:

> "Josephine never made any claim upon him (Blazius M. Chesebrough) during the eight years of his life subsequent to the separation, nor for fourteen years after his death did she assert any claim to the large estate which he left."

How, then, after these twenty-two years of silence, as profound as that of the grave, does it come that these people now speak? If the evidence is analyzed with a little care, I think we shall find a very satisfactory answer to the question.

It will be remembered that Josephine left Mr. Chesebrough (if abandoning the vicinity of a man who seemed to have and assert no claims upon her, and on whom she did not appear to have or assert any claim, can be called leaving him), her child, her mother and her family, her native city and her friends, a few months after Leonora was born, went to Charleston, remained there and in Nashville, Tenn., from that time on, all through the period of the Civil War, and down to 1880, with the exception of one brief visit to New York in 1868, living most of the time as the mistress of a man by the name of John Jackson, whose name she bore, all the time, not only while she was his mistress, but after the relationship had ceased; that during this time she had not disturbed Mr. Chesebrough while living, or made any claim to his estrte after he was dead, and that she had lived in the South as he had lived and died in the North, in all respects as if neither had ever known the other.

Josephine has testified (Vol. VII, fol. 812) that she never considered herself or believed herself to be the wife of Blazius M. Chesebrough, and (fols. 926 to 927) that so far as she knew, he did not, at any time, consider himself her husband or believe himself to be such, and that there never was any change in the relationship, from the time when she shared his bed on the night they first met at the dance house, and that she never had used the name of

Chesebrough or called herself Mrs. Chesebrough, from the time she left him up to the time of Leonora's visit to Nashville, in 1880. Mrs. Cregier had demanded money from Mr. Chesebrough as long as he lived, on every pretext except one, and that one was that she was the mother of his wife. Leonora had tried to appeal, if we may believe her story, to Mr. Charles A. Chesebrough's generosity, but never had made any assertion of a claim of right, as the lawful issue of his brother, Blazius (Vol. III, fols. 4306 to 4448).

Mr. Thomas E. Arnold, husband of Leonora, testifies (Vol. III, fol. 4503) that until he was accosted by Mr. Clarence Buell in a saloon in Park row, New York, in the fall of 1879, he had not "heard or learned in any manner, or from any source, that his wife had any claim on any property, real or personal, either derived from her father or grandmother, or otherwise."

He says (Vol. III, fols. 4501, 4502):

> "I was in Park row, between Ann and Beekman streets, New York, on some business, and I dropped in a saloon to take a drink, and while there a man addressed me, 'Are you not Thomas E. Arnold?' I told him yes, that was my name. He said, 'Did you not marry Leonora Chesebrough?' I said, yes. The man had been drinking, and I edged away from him; he followed me up and said. 'There's some property coming to your wife and I can put you on to it.' I felt scary of him; *thought it was a confidence game;* and I told him that as he knew my name he could find my office, as I was pretty well known downtown in the liquor business; he could call on me there if he had anything to say, and I would listen to it. He never called on me; it passed out of my mind for the period. I never saw the man before—but I recognized him seven years afterwards in Mr. Morris's office as Clarence Buel."

The occupation of Clarence Buel, throughout the greater part of his life, so far as we may judge from

this record, seems to have been doing a brokerage business in claims against Mr. Blazius M. Chesebrough and his estate. When Rachel Cregier obtained the judgment of $2,500, in 1861, Buel steps in, advances a small sum in cash, takes an assignment of the verdict and puts up a nice little game to cheat Mrs. Cregier out of the balance (Vol. IX, fols. 1147 to 1182). He goes into business with a lawyer of unsavory reputation by the name of Buckley, and between them they bring and prosecute some thirteeen or fourteen other suits against Mr. Blazius M. Chesebrough (Vol. IX, fols. 778 to 1250).

Later, as we shall see, brokerage gets bad, and he goes into the perjury business.

It is this same Clarence Buel, at one time a page or servant of Mr. Blazius M. Chesebrough, who, under the genial influence of the Park row saloon bar, first suggested to Mr. Arnold the idea that there may be something to be made out of the Chesebrough estate, and the impression which the first mention of the subject made upon Mr. Arnold is well worth noting. He "thought it was a confidence game."

Mr. Arnold never thought more wisely in his life.

Mr. Arnold is a man who cannot be drawn into a confidence game all at once or by a man like Clarence Buel. Time goes on until April, 1880, when a more skilful, if not more experienced, "confidence" operator steps upon the scene, in the person of Mr. John F. Miles (Vol. III, fols. 4504 to 4510). At first even Mr. Miles does not succeed in roping in his victim.

> "13 Q. Did you take any steps of any kind after this man met you in Park row to inquire as to any claim or interest of your wife in any property? A. No, I made no inquiry until after Mr. Miles called on me and informed me that there was something due my wife from her father, and about two or three weeks after that" (Arnold is the kind of a

fish which doesn't grab the bait too eagerly) "I informed my wife of what I had gleaned from Mr. Miles, as he had called on me three or four times after the first visit. I did not mention to her his name. Then I took steps for her to go and see her mother and to inquire from her what there was due her– my wife. *That is the first time I made any inquiries as to any claim, which was May, 1880.*

14 Q. What did Miles tell you, when he called on you, in the latter part of April, 1880? A. The first visit, I can give the drift of the conversation. It was mostly if I had married Leonora A. Chesebrough; what I knew of her relations, as his point seemed to be to identify some one. As he informed me in the beginning that he was looking for a lady of that name; that he had some valuable information by which there was some property due her; he was very reticent in giving me any information on his part" (a magnificent mystery seemed to be the dodge that Mr. Miles was working). "But after he had got all the information from me in regard to my wife and her name, he informed me that she was the person, and she was entitled to some property from her father. The interview was short, then, as I was busy and as I wanted to gain time to think over it" (cautious and conservative Mr. Arnold). "An engagement was made for another time, three or four days later. He then imparted to me that my wife's mother was living, that he knew where she was, after I informed him that my knowledge was that she was dead, or my information. He wanted to have me let him see my wife, which I declined at that time" (wise Mr. Arnold) "till I had got more particulars out of him to see what he wanted and was after. He said he had spent some time looking up this information that he had, and money, that he would not disclose it, but wanted me to have my wife make a contract with him, to obtain it for her. He was still reticent in regard to what the property was or where, except that it was something due her from her father, and that the amount was not very large" (it would not do to apprise

Mr. Arnold too suddenly of the magnitude of the fortune he had acquired with his wife). "That was about the close of that interview, and he was to come again after I was to see my wife. In those days I used not to get home till eleven or twelve at night, was very busy, as part of my premises had been burned out, and I was fixing up two buildings two blocks away to take the place of that department. Going from one place to the other took up my time during the day, and I used to do my writing at night. I did not say anything to my wife till the second interview or after, when Mr. Miles and I seemed to get better acquainted. He was still reticent about the property or where; but he told me that I would have some trouble to prove a marriage" (a very wise remark; it had to be manufactured as well as proved) "and get the information about it without his help. It seemed to me to be a bluff game" (a bluff game wouldn't work with Mr. Arnold) "to induce me to place confidence in him and his ability to get information which I would be unable to get without a great deal of expense and trouble, which he had already gone to; it would pay me to let him have a contract from my wife, and as I was a busy man, relieve me of all trouble or attention to the same. I then surmised it would amount to something" (the fish is beginning to nibble), "and I spoke to my wife about it, that a gentleman had called, and I related to her some of these facts. *She seemed to be in total ignorance of any money coming to her*" (the heiress of all the Chesebroughs, the recipient of her father's bounty, who had attended his funeral, who had talked over all these matters 'in the family' with her mother, grandmother and aunt, on her mother's visit in 1868 or 1869 (Vol. III, fols. 3928 to 3933); and who, only a few years before, had spent six months with her mother in Nashville—in total ignorance of the wealth and the title which it was hers to inherit!); "so I suggested to her about that time that she should go out and see her mother, as she had informed me then that the last time she

saw her she was in Nashville. As I could not go myself, I sent my bookkeeper to accompany her. Mr. Miles called again at different intervals during that year, but I had found out in the meantime that he was getting his information from some other lawyers" (Norris and Wilson) "that he was in employ of, or under some contract; I gave him the cold shoulder" (the fish is trying to get the bait without taking the hook).

Mr. and Mrs. Thomas E. Arnold apparently soon after enter the firm of Buel, Miles, Norris, Wilson & Co., as full partners, and the next step is taken by Arnold, himself. He has been married in January, 1879, but married in a peculiar way.

I will quote the description which Mr. Arnold, himself, gives of the marriage, without comment (Vol. III, fols. 3282-3):

"11 Q. When were you married, if ever, to your wife? A. I was married in 1879; January 15th, to Leonora A. Chesebrough, *by an agreement*, and then the ceremony before a minister, May 26th, 1880."

* * * * * * *

And fols. 3310 to 3313:

"110 x-Q. Where was this agreement made, that you say was made in January, 1879? A. In the ladies' parlor of the Astor House, New York City.

111 x-Q. In whose presence? A. Nobody's presence. I passed a ring over and we agreed.

112 x-Q. Had you come there for that purpose? A. Yes.

113 x-Q. Had you engaged a room in the Astor House at that time? A. I did afterwards, an hour or two afterwards, and we have continued to live ever since together.

114 x-Q. Did you go there with her or did you meet her there? A. I met her there.

115 x-Q. You hadn't seen her that day until you saw her in the ladies' parlor of the Astor House? A. I don't believe so.

116 x Q. When had you made the appointment to meet her there? A. Well, I don't recollect; seems to me it was the day before.

117 x-Q. Where had you made the appointment? A. What is that.

118 x-Q. Where did you make the appointment? A. Where she was boarding, in Sixth avenue.

119 x-Q. Where did you spend the time between the time you made this agreement and passed over the ring, as you have mentioned, and the time you engaged the room an hour or two afterwards, as you have mentioned? A. I don't quite understand you.

(Question repeated). A. I think it was in the parlor—the ladies' parlor—there in the Astor House; no doubt went in to dinner.

121 x-Q. And thereafter you took the room and continued to live there until you moved afterwards; how long afterwards? A. Well, we went, I think, the next day to Bayonne.

122 x-Q. You remained there one night after the agreement was made? A. I am sure of that; it was one night."

This was all before the conferences between Arnold and Buel and Miles, and it seems to have been enough to have satisfied the parties most interested, but when it is proposed to organize the Nashville Syndicate, and for the first time in the world make a claim of marriage between Leonora's father and mother, a more regular marriage is thought desirable, so that these people might go into Court, if need be with a clean record if not with a clean conscience; and this marriage *pro lite*, in contemplation of the legal assaults upon the Chesebrough estate was entered into (Vol. III, fols. 3282 to 3283 and 3383 to 3384).

From this time Mrs. Arnold and Mr. Arnold, on her behalf, appear to have had the laboring oar, (fols. 3326 to 3341, 3478 to 3485).

Mr. Arnold, and Mr. Norris, who is examining him, are both naturally very tender upon this point, and upon Norris's direction Arnold refuses to answer a great many of our questions, but we suc-

ceed in getting enough out of him to show that it was Arnold who employed Norris and the other attorneys in the suits, and that it is Arnold, who, next to Buel, becomes thereafter the chief actor in the play.

The scene of operations is now transferred from the Astor House and the Park row saloon to Nashville, Tenn., and during this first half of the year 1880 we find Norris and Wilson and Leonora in conference with Josephine at Nashville. As to whether Buel was there with them we are not advised. He appears publicly upon the scene a little later. It is possible that he was saving himself for the supreme moment. The spoken word is so evanescent and fleeting that it drops out of history; it is the written document only that is preserved. Of the words which were spoken between Norris, Wilson and Buel, Leonora and Josephine, in Nashville, we have not much record, but the written documents speak for themselves. The first thing to be done is to get an affidavit out of Josephine. We have this somewhat curious document. ("Complainant's Exhibit, Affidavit No. 1," Vol. IV, fols. 4942 to 4949.) I give it here in full for convenience of reference:

"ANSWERS OF MRS. JOSEPHINE CHESEBROUGH TO THE ANNEXED INTERROGATORIES.

Number 1. My maiden name was Josephine Cregier. I was fourteen years of age when married to Blazius Moore Chesebrough in 1853, in city of Baltimore, Md.

Have no certificate of our marriage, nor do I know the name of the minister who married us; were married, as I believed, in the minister's residence in Balto., but do not know the number or name of street; no witnesses were present at the ceremony.

No. 2. I had two children by Chesebrough. The oldest was a boy, born at Saratoga Springs, at United States Hotel. Mr. Marvin was the proprietor of the hotel, in or about

September, 1854. This boy lived only one week, and was buried there. The next child born was a daughter, about 1855. Leonora is her name, but is called or nicknamed Lola Chesebrough. She is now living, or was when I heard from her, in New York City. These were the only children I had by Chesebrough; none born or buried in Penn. I heard from Lola about for years ago; my sister, Elmira by name, was living also in New York City when I heard from Lola. I have not heard directly from my sister, Elmira, nor seen her, since I left New York in or about 1872. Lola came and was with me during eight or nine months, after I returned from New York City to Nashville, Tenn.

Number 2 (continued).—I have not seen Lola since she returned from Nashville, Tenn., to New York; her full name is Leonora Chesebrough.

Number 3. Captain Speight never gave me any money either to leave New York or since I left there. I have never signed any papers or writings of any kind for him or at his request. When I left New York I paid my own way with money I had from Chesebrough, and left without his knowledge or assistance from any one, and have not signed any papers.

Number 4. I have seen Dr. William Groves repeatedly, or several times, since Lola was born, during 1856 and 1857, whilst at my mother's house in New York. My mother brought suit against Blazius More Chesebrough about 1859 for the support and maintenance of our daughter Lola, and I understood recovered judgment for $2,500.00 against him. My mother's name was Rachel Cregier.

Number 5. I left New York City for Charleston, S. C., of my own accord, in 1858.

Number 6. My husband's name was Blazius, but was changed to George More Chesebrough before I married him, so he told me, but why I do not know.

Number 7. I have never known or heard anything relative to the occupation or social standing of any of the following parties:

George Doremus, James Bensel or John Mockler, unless the latter one was a clerk in the hotel, corner of Broadway and St. Mark's Place whilst my husband and I were boarding at this hotel. The name of it I cannot now recollect.

Number 8. I knew Clarence Buel whilst we were boarding at the Everett House, soon after we were married, and in 1854 he was acting as a servant and carriage driver for my husband also at Saratoga Springs and other places that we visited whilst I was with my husband.

Number 9. I think we were boarding at the Everett House in 1855 or 1854, or maybe sooner. I think we were boarding at U. S. Hotel in September, 1854, and not in 1858, at Saratoga Springs.

Number 10. Yes, I could identify my daughter Leonora any time and place I might see her. She has no personal marks on her that I now recall. The color of her hair was brown, and dark brown eyes. I have received several letters from my daughter since her return to New York, signed in her own name, which I now have in my possession.

Number 11. I cannot recollect of any one but Clarence Buel who originally came from the interior of New York State, when a boy, to live and travel with my husband and myself, as a servant, for three or four years after we were married. I do not know where he is now living, but the last time I heard of him he was living in Chicago, Ill.

Number 12. I was introduced to my husband, Chesebrough, in New York City about 1852, and ran off with him to Baltimore, Md., and married him in 1853. We had lived together about six years."

It will be noticed that this document is entitled "Answers of Mrs. Josephine Chesebrough to the annexed interrogatories," and the document seems to be in the form of answers, but the written interrogatories have somehow mysteriously disappeared. It would be curious to see in just what form they were, or from what source they ema-

nated, and whether or not they were in Buel's handwriting.

It will be noticed that, in the answer to No. 1, she says that she was only fourteen years old when she was married in 1853, in the City of Baltimore, Md., and that she was married by a minister, at his residence there.

There is no pretence or suggestion here of any other than a ceremonial marriage. The idea of proving a common law marriage or a marriage by repute had not then occurred to these conferees at Nashville. Their plans were afterwards modified, and the bill of complaint alleges a marriage in 1854 instead of 1853, and makes no mention of Baltimore, and when they come on to a hearing it is a common law marriage, which didn't take place anywhere in particular, instead of a ceremonial marriage, which needs must have a local habitation, that they rely on.

The question to which answer No. 3 is given would be interesting, if we could have it. It would appear that somebody was very anxious to know whether she had signed any papers, giving any other version of the story which might come up against them afterwards.

The answer No. 4 shows that Josephine knew all about the seduction suit in the Superior Court, and how it resulted.

Will any one believe that if she were a wedded wife, as she claims, she would have sat tamely by and seen the suit which branded her as a harlot and her daughter as a bastard proceed without raising her voice against it?

The broker, Clarence Buel, figures in the answer to question Number 8, as he had theretofore figured, and has since figured, in every attack which was ever made upon Chesebrough when living or his estate when dead.

Number 11 also refers to Clarence Buel; apparently the chief actor in the proposed tragedy.

Answer Number 12 is somewhat curious. If, as she says in answer Number 1, she was fourteen when she was married to Chesebrough in 1853, she was thirteen when she was introduced to him, as she says in this answer Number 12, in 1852—a somewhat early age for a courtship, a dance house assignation and an elopement.

But Josephine makes up for the precocity of her early engagement and marriage by her extreme deliberation in giving publicity to it. If she was married at thirteen or fourteen, in her immature childhood, when she would naturally be going about in short dresses, she never avows it until the abundant maturity of her womanhood, and when her hairs are silvered with the touch of approaching age.

This affidavit is signed by Mr. L. R. Wilson as a witness—I suppose to give additional solemnity to the proceedings and to bind Josephine's conscience more securely. This L. R. Wilson is the same person who appears in the next document (Vol. IV, fols. 4951 to 4954), which is entitled "Josephine Chesebrough's Power of Attorney to Wilson and Norris." For convenience, I here insert this also in full.

> "KNOW ALL MEN BY THESE PRESENTS, that I, Josephine Chesebrough (widow), of City of Nashville, Tennessee, have made, constituted and appointed, and by these presents do make, constitute and appoint, Louis R. Wilson, of said City of Nashville, Tenn., and George Norris, of City, County and State of New York, my true and lawful attorneys, for me and in my name, place and stead, to sue for and collect any and all claims or interests that I may have upon or in the estate of my husband, George More Chesebrough, late of said City of New York, deceased, of every nature and kind whatsoever.
>
> Provided, however, that out of any and all sums of money by them collected, by virtue hereof, my said attorneys, Wilson and Norris, shall pay over to me the sum of ten thousand dolls. ($10,000), if so much shall be collected by them, and if less than that

amount, then my attorneys are to pay me all the money so collected by them. The interest being that my said attorneys, Wilson and Norris, shall keep and retain for services rendered by them, and to be equally divided, one-half to each of them, all amounts of money by them collected over and above said sum of ten thousand dollars, to be paid to me. I hereby agree to give to my said attorneys all information and assistance possible in their collection of said claims and interests, against the estate of my husband, Blazius or George More Chesebrough, late of said City of New York, deceased. Giving and granting unto my said attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all, that my said attorneys or their substitutes shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this twentieth day of April, in year one thousand eight hundred and eighty.

JOSEPHINE CHESEBROUGH. [L. S.]

Sealed and delivered in)
the presence of)
HARRY L. CLAIBORNE, Jr.,
G. A. WASHINGTON."

The prudent and business-like way in which these people start this matter is specially noticeable. Wilson & Norris take the contract of putting the claim through, and take all the chances. Josephine gets ten thousand dollars, if they recover as much, or if they don't get so much, she gets *all* they recover.

This contract is dated the 20th of April, ten days after the affidavit, long enough to have had communication by mail with Mr. Arnold or Mr. Buel at the headquarters in New York.

The record does not inform us who Mr. Louis R. Wilson is, except that he is "of the City of Nashville, Tenn." George Norris, his co-contractor, we know all about. From that time on, down to the close of the complainants' proofs in the suit we are now trying, he was the attorney of record and leading counsel for Leonora and Josephine whenever they appeared in court.

It would seem that the parties got to this point before Leonora actually appeared in Nashville, but she soon arrives, and, on the 31st of May, Josephine executes a power of attorney in Leonora's favor (Vol. IV, fols. 4864 to 4869), and an assignment to her of "all the right, title and interest I have in any property real, personal or mixed, of every nature and description whatever, that has or may hereafter vest in me or to which I am entitled in the City of New York or elsewhere, by virtue of my marriage with my late husband, Blazius More Chesebrough" (fols. 4870 to 4875), and "every species of property coming or belonging to me as the wife of said B. M. Chesebrough."

We set out these two documents in full.

"JOSEPHINE CHESEBROUGH'S POWER OF ATTORNEY TO LEONORA A. ARNOLD.

I DO HEREBY NOMINATE AND APPOINT Leonora A. Arnold my attorney in fact to demand and receive for me from one Chas. Chesebrough, or any one else having possession of, or liable for the same, a distributive share of property, either real or personal, which I inherited from my husband, Blazius Moore Chesebrough, deceased, late of the County of New York and State of New York, and all receipts, bonds and acquittances for me and in my name to execute, for and about the same. I do further empower my said attorney to sue for and recover the same, or any part thereof, whether the same be real or personal estate, and for that purpose to employ counsel and do all other acts and things necessary to accomplish the ob-

jects of this power at my expense and charge. And I do hereby ratify and confirm all the lawful acts of my said attorney in the premises as fully as if I were present and doing the same myself; and I hereby revoke any and all powers of attorney given by me heretofore, and especially do I revoke the power of attorney given by me to one Wilson, on or about the 10th day of May, 1880.

Given under my hand and seal this 31st day of May, 1880.

JOSEPHINE CHESEBROUGH. [L. S.]

Attest:

C. H. GOODLETT,
GEORGE P. SIMONSON, JR."

"MRS. JOSEPHINE CHESEBROUGH'S RELEASE TO LEONORA A ARNOLD."

For the consideration of five dollars to me this day paid, and the love and affection I bear to my daughter, Leonora Augusta Arnold, I do hereby give, transfer and convey to her all the right, title and interest I have in any property, real, personal or mixed, of every nature and description whatever, that has or may hereafter vest in me or to which I am entitled, in the City of New York or elsewhere, by virtue of my intermarriage with my late husband, Blasius More Chesebrough, hereby conveying the same to her as fully and completely as if the same were specifically described and set out, it being herein intended to convey to said Leonora A. Arnold every species of property coming or belonging to me as the wife of the said B. M. Chesebrough.

Given under my hand and seal this 31st day of May, 1880.

MRS. JOSEPHINE CHESEBROUGH. [L. S.]"

The effect of all these documents taken together is that Wilson and Norris, being the first in the field and having the first contract, are entitled to go on and attack the Chesebrough estate and the Chesebrough property in any way they like, and when they have paid Josephine ten thousand dollars, they can have the total result of all their freebooting expeditions for all time to come.

But Leonora, coming later, purchases and pays for the remaining interest in Josephine's claims and rights, which Wilson and Norris have not already acquired, and so, she, Leonora, is entitled to stand in Josephine's shoes. That is, Leonora, instead of Josephine, is entitled to receive the ten thousand dollars, and to exercise whatever right of control or direction over Norris and Wilson that may have been reserved to Josephine in the first arrangement with them.

Josephine steps out of the case. She has executed the contracts. She has signed the affidavit. She has received the five dollars in cold cash, and she has nothing more to do with it.

Five dollars was all that Josephine appears to have received, but if only honest prosecution of the claim was intended, it was just five dollars more than it was worth.

An honest prosecution, however, of any claim against Mr. Charles A. Chesebrough, or against the Chesebrough property or estate, was the last thing that any of these parties intended. Honest work is not the sphere in which men like Clarence Buel, John F. Miles, Lewis R. Wilson and George Norris shine.

Leonora tells us the disposition that was made of these important papers, the foundation of all that has been done since then (Vol. III, fol. 4328).

> " 72 Q. Did you bring these papers on with you, that your mother gave you? A. Yes.
> " 73 Q. To whom did you give them? A. *My husband.*"

The next step in the proceedings is the commencement of a suit under these various powers of attorney and contracts, on behalf of Josephine, against some poor people who had purchased a house on Baxter street, a half interest in which had belonged to Mr. Blazius M. Chesebrough at his death.

Mr. Arnold tells us, not as cheerfully as we could wish, under whose direction the suit was commenced (Vol. III, fols. 3328 to 3332):

> "172 x-Q. Have you taken any active part in the management of this case on the part of the complainants? A I have done all I could for my wife's interest; no interest in it myself.
>
> 173 x-Q. How long have you been engaged in working on this case? A. I don't understand your question.
>
> 174 x-Q. How long have you been engaged in doing all you could for your wife's interest in this case? A. Well, I should say since the time when she first asked me to take care of it for her, and that would be——
>
> 175 x-Q. When was the first time she asked you to take care of it for her? A. *When she mentioned who her father and mother was, I should look after her interest.* And I have done it; at times, maybe one or two or three days some years, and a great many months in other years, as I could spare the time.
>
> 176 x-Q. *Have you employed the attorneys engaged in this case? A. I believe I have, with my wife's assistance. I have advised her as best I could.*
>
> 177 x-Q. *Have you personally employed the attorneys and made the arrangements with them? A. I decline to answer.*
>
> 178 x-Q. How many attorneys have you personally employed in this case? A. I have never employed any attorneys personally, without my wife's permission or under her orders.
>
> 179 x-Q. How many attorneys have you employed on her behalf, through your personal intervention? A. Two attorneys.
>
> 180 x-Q. What two? Benjamin S. Clark, who died, *and George Norris are the attorneys.*"

The attack is first made, not upon Mr. Chesebrough himself, or upon the estate, but upon people who know nothing about the matter and have no connection with it, except that they have innocently bought some property and paid for it, in which, if

Josephine's claim of marriage was true, she would have a right of dower. The suit is brought, an answer is interposed (Vol. IV, fols. 5054 to 5085), and then Mr. Clarence Buel, who has been behind the scenes all the while till now, steps to the front and appears in the roll of witness and perjurer.

The only evidence ever offered by the plaintiffs in that suit, or which apparently they ever attempted to obtain, was the deposition of this Clarence Buel, who gained such an unsavory notoriety in 1861, in the seduction case, who approached Thomas E. Arnold, in the fall of 1879, in the drinking saloon in Park row, and who figures so prominently in Josephine's affidavit in Nashville, in 1880. Clarence Buel's deposition is contained in this record (Vol. IV, fols. 5095 to 5334). The complainants, very prudently and for obvious reasons, did not call him as a witness in this case we are now trying, and we have not had the much coveted opportunity to confront and cross examine him, and therefore, under well-settled rules of evidence, his testimony, no matter how credible it was, could not be considered in deciding the issues in this case. We promptly and seasonably objected to the introduction of the deposition, on the ground that it was immaterial, irrelevant and incompetent, and the objection is certainly good. Why the complainants have seen fit to spread it upon the record and print it, we are unable even to guess, but it is there.

What he testifies to, however, even if it was competent in this case, is of no possible consequence, for it was proved to be a clear lie, cut out of whole cloth. He found himself on the way to State's Prison, and he makes an affidavit of retraction, contained in Vol. IX, fols. 769 to 777. This affidavit is as follows:

"U. S. CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

JOSEPHINE CHESEBROUGH

against

JOHN SINNOTT and ABRAHAM SOLOMON.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
State, City and County of New York, }

CLARENCE M. BUEL, being duly sworn, says: In a deposition taken *de bene esse* in the above-entitled action, before Edward B. Dickinson, on or about the 12th day of May, 1881, and on several days subsequent thereto, to wit, on or about May 16th and May 21st, I swore that I was employed by George Moore Chesebrough, afterwards known as Blazius M. Chesebrough, in August, 1854, as a page; that upon such employment he took me to the Everett House, in the City of New York, and introduced me to the plaintiff in this suit as Josephine Chesebrough; that he said, 'This is my wife, Mrs. Chesebrough, and you will obey her implicitly in any instructions that she may give.'

I swore also, upon these examinations, that Chesebrough introduced the said plaintiff to various persons as his wife; that I have traveled with them to various places during the summer and autumn of 1854—to Newark, Rahway, Philadelphia and Camden—stopping at various hotels, where he registered as G. M. Chesebrough and wife, and where he introduced the said plaintiff to various persons as his wife; that he registered at a hotel in Warren street, in this city, in the same manner, and introduced her to various persons in this city as his wife, and spoke of her to various persons as his wife; that afterwards I was employed by him at 53d street, in this city, at 17th street and at Fort Washington,

and that in those places, or at some of them, he spoke of said plaintiff as his wife, to me, and in my presence, to other persons.

I now, swear and swear, correctly that every part of such deposition wherein I stated that Chesebrough introduced said plaintiff to me or to any other person as his wife is false and untrue. I never heard him introduce her to any person as his wife. I never heard him speak of her or to her as his wife. I never knew of his registering or being registered at any hotel or boarding house as G. M. Chesebrough and wife or in any other manner as man and wife. I never heard he was married or claimed to be married to the plaintiff in this action or to any other person, and I never knew or heard at the time of the occurrences stated in the said deposition that the said plaintiff claimed to be his wife.

At the time the said plaintiff was living with the said Chesebrough, as I have sworn in such deposition, *it was well known and understood that she was living with him as his mistress;* that said Chesebrough often spoke to me of her as his mistress, and called her his mistress in my presence; that he never spoke of her as his wife to me or in my presence, anything contained in said deposition to the contrary notwithstanding; that prior to the time the said plaintiff lived with said Chesebrough, as I swore in said deposition, I knew her as a common prostitute.

A short time before such deposition was taken I met by appointment George Norris, of 206 Broadway, in this city, and John N. Beach, who has since died, at a liquor store kept at No. 2 Courtlandt street, this city. We met there for the purpose of arranging for the prosecution of this suit. Norris told me what it was necessary for me to swear to to sustain the case, and he promised me at that time that I should be well paid if I would so swear. He said there was enough money in the case for all of us.

I regret having made such deposition,

which is absolutely false in the particulars I have mentioned in this affidavit.

CLARENCE M. BUEL.

Sworn to before me this 4th day of January, 1883.

HARRY F. LAWRENCE,
Com'r of Deeds,
N. Y. City and Co."

This was a fitting close to that particular litigation.

The statement which he makes in the concluding part of it, in reference to Mr. George Norris's connection with this perjured testimony, is one which would seem to call for some attention or reply, but from that day to this no syllable has been heard from Mr. Norris upon the subject, and for nearly six years thereafter he continued to act as the attorney of record and leading counsel for these complainants, educating other witnesses like Buel and collecting and preparing other testimony like his.

Mr. and Mrs. Arnold, the complainants in this case which we are now trying, have, naturally of late, tried to avoid the responsibility for this 1881 suit and the perjury which covered it over from beginning to end, by swearing that they were not personally concerned in its management. But one letter is worth a hundred oral statements in a matter of this character. Some of the letters from Josephine to Leonora, from July, 1880, to May, 1886, the complainants have done us the favor to introduce in evidence (Vol. IV, fols. 4876 to 4940).

August 3, 1880, she writes (fol. 4882):

> " I have not heard anything about *our suit* of any consequence, my dear. Mr. Wilson" (one of the contracting attorneys) "has been back from New York, I think, three weeks, but I have not seen him since the day after he got home. I told him I had not heard from you at all, so that settled it. He has not called on me since."

August 25, she writes (fols. 4886-7):

> "I have not heard anything concerning *our* case as yet."

October 23, 1880, she writes:

> "As you said in your last letter, that if we were together we could study the matter" (the projected litigation) "over, and it would be much better for both of us."

March 14, 1884, she writes:

> "I hope by this time you have heard something from *the case*" (fol. 4916).

May 11, 1886, she writes (fol. 4939):

> "Look out for him" (Clarence Buel). "*He is a perfect rogue.*"

No truer word was ever spoken.

All through, the letters show that Josephine's interests are entirely in the hands of Leonora and her husband; that the most cordial relations exist among them, and that they are all working in entire harmony.

In the face of these letters which they have so kindly produced, and of the other testimony which we have so abundantly quoted and referred to, Mr. and Mrs. Arnold's claim that they were ignorant of this 1881 suit will hardly be credited.

They certainly came to the front at the time the next move was made, which was in 1884.

The fish they caught that time was one of the kind for which they had baited their hooks. A part of this Washington Heights' farm, of which Blazius had inherited a one undivided half part from his mother, and which was in the portion set off to Blazius in the partition deed of 1861, and which Mr. Charles A. Chesebrough, as the brother and only heir of Blazius, had conveyed after the death of Blazius in 1866 to George

Ehret, the brewer, was under contract to be sold by Mr. Ehret to the heirs or estate of ex-Governor Edwin D. Morgan. Messrs. Lord, Day & Lord, were searching the title for Gov. Morgan's heirs. The Nashville syndicate step in just in time, make a claim, and insist upon being bought off. Mr. Charles A. Chesebrough declares himself ready, whenever and wherever it may be necessary, to defend the title which he gave, but declines to buy his peace from the syndicate. Mr. Ehret and Gov. Morgan's heirs are more complacent and they make up a pool between them to pay the required tribute. The terms demanded were, it must be conceded, quite reasonable. The purchase price of the property was $400,000. If Leonora and Josephine were entitled to anything, they were entitled to the $400,000. They settled for ten thousand dollars, and appeared glad enough to get that, and Josepine and Leonora are both promptly on hand to sign the quit-claim deed (Vol. I, fols. 1440 to 1449).

This is the first blood for the Nashville syndicate.

It goes on to 1886; this present suit is commenced, the tribute shop is kept open, and the Nashville syndicate have done quite a flourishing business, under the leadership of Mr. George Norris. This time it is Josephine herself, and not Clarence Buel, who is produced as the witness to prove the marriage; but, like Clarence Buel, when she sees the consequences of her perjury, she too retracts. I shall deal with this more at length in my next point.

The fine and experienced hand of Clarence Buel is, however, still found steering the complainants' frail bark, although, from circumstances beyond his control, his public appearance just at present is not practicable. Mr. Thomas E. Arnold meets him in 1886 at Mr. Norris's office (Vol. III, fol. 4502). He attends court with Josephine, and Peter Staeden on another occasion, and puts his services at the command of the complainants (Vol. III, fols. 4526

and 4527; fols. 4349 to 4350). He is apparently so intimate with Leonora and her husband that Josephine feels it to be her duty to warn them against placing too much confidence in his fidelity (Vol. IV, fol. 4939), and the evidence of his renewed activity and continued interest is found all the way through. He is evidently still an active partner in the Nashville syndicate.

If the Court reads this history, as I read it, it will come to the conclusion, that the Nashville syndicate was organized and the Nashville agreements executed, not with any intention or expectation of recovering any judgment against Mr. Charles A. Chesebrough, or of recovering, by any process of law, any part of the Chesebrough property or any sum of money from the Chesebrough esteate. But it was all done for the purpose of accomplishing only just what they have accomplished, to wit, compelling purchasers or sellers of portions of this property, or timid holders of it, to pay tribute to them in order to avoid a cloud upon the title. It was organized for the purpose of levying blackmail and for nothing else. It was known from the beginning, to all of these parties, that the marriage, which never had been asserted during Mr. Chesebrough's life or for fourteen years after his death, was a myth and a sham. It was known that there was no basis for their claim against this property, but it was believed that something would be paid to buy them off; and that is the explanation of the lie of Clarence Buel, in 1881, and the lie of Josephine Cregier in 1886. The case was conceived by Clarence Buel, nursed by George Norris and Louis R. Wilson, and has only received, in latter days, enough interjection of respectable counsel into the poisoned virus of its system to get a hearing in Court.

And now, with Judge Lacombe's clear, trenchant and convincing opinion and his decisive judgment against them, they appeal to this Court, and one of their principal grievances here is that the judgment of the Court below is of such form and nature that

the question of a marriage between Blazius M. Chesebrough and Josephine Cregier is forever *res judicata*, and all titles dependent upon it, are forever settled.

They would be entirely satisfied if the Court would only, while deciding the case against them, give them a chance to commence another suit, file another *lis pendens*, and keep the tribute shop open a few years longer.

VII.

The testimony of Josephine.

I have now arrived, in the logical sequence of the argument, to the point where we can consider the testimony of this woman, Josephine. I have, in previous points, dwelt at some length upon the history and conduct of the parties, and the circumstances under which the suit was evolved, in order that when the Court comes to consider this somewhat extraordinary piece of testimony, it may be able to do so in the light of its environment and of its surrounding circumstances. If I were content to simply blot out from the record the evidence of this witness, I could put in parallel columns her testimony that she was married and then her retraction of it, and rest upon that. I am not satisfied, however, with anything less than a full presentation to the Court of all the evidence which can be gleaned from the record, and all the inferences which are naturally to be drawn from the acts of the parties and the conduct of the litigation and all the light which we can throw upon this subject, from whatever source it comes.

Reading Josephine's two stories, in the light of all this, I contend that it becomes clear that she was

lying when she said at first that there had been a marriage, and that her second story, in which she retracts this and admits that there never was any marriage or anything in the nature of a marriage, was the simple truth.

Mr. Justice Lacombe speaks of her testimony as follows:

> "In 1854, when he first encountered Josephine Cregier (though some testimony would make the date 1853), he was about thirty-five years of age and she was sixteen. They met at Sirocco's dancing-rooms in Bond street (Blazius having apartments in the same building), and that same night she shared his bed. Shortly thereafter she left her mother's home and lived with him in Bond street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection. It is contended by the complainants that subsequently, in 1854, they were married in the City of Baltimore, whither they made a trip for that express purpose, and Josephine herself, testifying for the complainant, gave direct evidence to that effect. Subsequently, when called by the defendants, she retracted her former statement and testified that she was never married to Blazius M. Chesebrough in Baltimore or elsewhere. If her later testimony were to be accepted, there need be no further enquiry. Certainly, in view of her admitted perjury, the complainant cannot insist that her testimony affords direct proof of a marriage. If her evidence, both ways, on that point be disregarded, such proof can only be found, if at all, as a necessary and natural inference from all such circumstances as are established by the testimony of credible witnesses."

The allegation in the bill of complaint in reference to this marriage is somewhat remarkable. It is as follows (Vol. V, fols. 26 and 27):

> "*Fourth.*—Your orators further allege that the said Blazius M. Chesebrough and Joseph-

> ine Cregier intermarried *in the year 1854*" (no month or date is given; no place is mentioned, and no information as to the manner or circumstances of the marriage are set forth), "and cohabited together as husband and wife *until the year 1857*" (the cohabitation, according to this allegation, may have ended January 1, 1858, or it may have continued until the death of Mr. Chesebrough in 1866). "*Then* Blazius died" (between 1857 and the time he died was a period of nine years) "leaving him surviving the complainant, Leonora Augusta Arnold, his only living issue, and left him surviving no other issue, nor any issue of any deceased child of his."

Mr. Averill, at the time of the commencement of this action, and all through the taking of the complainant's testimony herein, was counsel for the complainant, and specially active as such counsel. He was *the* one who apparently had charge of collecting the evidence and preparing and producing the witnesses. It crops out all through the testimony of Peter Staeden, Julia H. Doubleday, Samuel E. Meade, Danief Goff, Lawrence Harran and other witnesses, that he was the counsel who sought them out, conversed with them in relation to their testimony, and prepared them for the witness stand, and that he usually appeared in court with them and took part in their examination, as one of the complainants' counsel (Vol. I, fols. 235 to 1065). Josephine had been brought on here from Nashville a long time before the commencement of this case, and was taken to Mr. Averill's house at Sand Lake, near Troy, in this State, where she lived until her final appearance as a witness, always at the beck and call of these complainants (Vol. III, fols. 4190 to 4192; Vol. VII, fols. 805 to 930; Vol. III, fols. 3280 to 3488; 4158 to 4195; 4306 to 4448; 4498 to 4569). I have already, in a previous point, set forth the documents, letters and testimony which show her entire harmony and sympathy with these complainants. All through the taking of the testi-

mony in this case the record shows that she appeared with the complainants and at their instance, in court and out of court, for the purpose of identification by other witnesses, and for any other purpose for which she might be useful (Vol. I, fols. 190 to 1065).

When called as a witness by the complainants she comes from the house of complainants' counsel and in his company (Vol. III, fols. 4158 to 4196; Vol. VII, fols. 805 to 929).

It is to be noted that this bill of complaint was drawn by counsel who had easy access to the woman, Josephine Cregier, and with one of whom she was then living at his own house, for the express purpose of being on hand whenever wanted.

If Blazius M. Chesebrough and Josephine Cregier ever in fact "intermarried," this intermarriage took place somewhere, at some time, in some way, and under some certain and definite circumstances. Marriage is a definite act, taking place under definite conditions. People are not married in the air or by any process of gradual evolution. The time, place, manner and circumstances of this marriage could easily be obtained from this woman by the counsel who were drawing the bill of complaint and inserted therein. It was their duty to do this, and they knew it. Whatever else may be said of the counsel, ignorance certainly cannot be imputed to them. The freshest student in a law office knows that this allegation is altogether too uncertain and indefinite to satisfy the rules of pleading.

Why were these rules so plainly and grossly violated? There can be but one answer to the question.

In stating a truth, it is easy enough and safe enough to give time, place and circumstance, fully and in detail. In stating a lie it is otherwise, and nobody knows this better than the man or the men who drew Josephine's Nashville affidavit of 1880

and Leonora's bill of complaint of 1886. The same hand and the same methods are apparent in both.

The prudence with which the complainants have avoided any direct statement of time, place and circumstances, in their bill of complaint pales, however, before the circumspection which their witness Josephine, whom they have guarded so closely and coached so carefully, shows upon these points in her evidence, and which the counsel examining her shows in his questions.

Her testimony, as the complainants' witness, is found in Volume III (fols. 4158 to 4195). I quote it (page 1387):

> "Q. Were you ever married? A. Yes, sir.
> Q. To whom? A. Blazius Moore Chesebrough.
> Q. In 1854? A. 1854.
> Q. 1854? A. Yes, sir; 1854.
> Q. Where? A. In Baltimore, Md.
> Q. Had anything previously occurred between you as to a marriage before this time? A. Yes; I lived with him a short time before I was married to him."

This is absolutely all the testimony she gives, and all that counsel asks of her. More than that, it is all the direct testimony there is in the case to the fact of a marriage. They rest without showing any date except the year 1854, or any reason why a more exact date cannot be given, any place except the City of Baltimore, or any reason why a more definite place cannot be named, and without showing any of the circumstances under which the marriage occurred, or any reason why those circumstances could not be proved.

The complainants' whole case hinged upon the fact of such a marriage. She could only win by convincing the Court that such a marriage had occurred. A statement of the definite place, the actual surrounding circumstances, what led to it, how it was brought about, and what followed it, would

have added ten-fold to the weight of the evidence, if the story she was telling were true. Still more important was it that this should be done from the fact that she had already, in the first half page of her testimony, confessed that the commencement of their intercourse was meretricious, and these people knew very well that it required much stronger evidence to prove a marriage where there was a vicious than where there was a virtuous commencement of the relationship. Why do they, so deliberately and cavalierly, sacrifice all the advantages they might gain by giving us more particulars on this most important subject?

Not only do they stop here with the witness Josephine, but they make no attempt whatever to corroborate her story. If there was a marriage at Baltimore, it was at some particular place, before or by some one, somebody was present, there were surrounding circumstances, there was something that led up to it, there was something that followed it. It would be incredible that such an event could have taken place without there being some supporting circumstances or some corroborating evidence of it. The ceremony of marriage is a formal one; it is a matter of record; in the State of Maryland, at this time, a license was required; it had to be celebrated before a minister and a record kept; newspapers published the fact; and the officers of the State registered it (Vol. IX, fols. 79 to 201; Vol. VII, fols. 574 to 600; Vol. VIII, fols. 514 to 630, 667 to 932).

It would be strange, indeed, that such an event could have occurred without there being some written document showing it or some permanent record made of it, which could be produced to sustain the complainants' case.

If, for any strange and unaccountable reason, it was impossible to produce such corroborating testimony, explanation could certainly be made of the reason why. If fires had destroyed the records themselves, this could be shown; if witnesses had

died, that could be proved; if documents had been lost, their absence could be accounted for; if memory failed, that could be explained.

Nothing of the kind is attempted. This testimony, on the truth or falsity of which is to depend the title to millions of property, is allowed to rest without any further explanation, without the slightest corroboration, and apparently without any attempt being made to support or confirm it.

The truth fits into its environment like a jewel into its setting; it is only made stronger by investigation; the surrounding circumstances support it; records are consistent with it; other witnesses confirm it; and the more it is questioned and the more that particulars are given, the stronger and the truer it appears.

It is the lie only which is not in accord with its environment, which cannot stand investigation, which cannot endure analysis, which is made weaker the more particulars are gone into, and the more it is contrasted with surrounding facts.

If Josephine's story had been true, it would have been infinitely strengthened by being made fuller, more detailed, and more particular, and by being corroborated and supported by surrounding facts and circumstances.

If it was false, this process would have weakened it, and none knew this better than the astute people who procured Josephine's affidavit in Nashville, and contracted to put through her case in April, 1880, who brought her to New York in 1881 and again in 1883, who boarded and supported her in the house of the complainants' counsel, and who coached and prepared her as a witness and presented her for examination before the commissioner.

The testimony of this woman, as thus given in November, 1887, has all the ear-marks of a lie.

She tells, on her cross-examination, the interesting account of the premarital journey to Baltimore, how they occupied the same bed several nights on

the way, and went directly to a hotel on their arrival in Baltimore and took and occupied a room together. It was to the hotel first; if any clergyman was consulted, it was afterwards. Lust was ever stronger than the matrimonial instinct. She tells how afterwards they continued the same life that they had led before. If there was any change in their relationship, nothing was done by them to indicate it; and then she tells how, a few years afterwards, their union ended as informally as it commenced. There was no suggestion of any such thing as a divorce or a formal separation of any kind. She simply went away and lived with another man, occupying apparently the same relations to him that she had formerly occupied to Mr. Chesebrough, except that her later amour seems to have been a more protracted and constant one; and the gambler who succeeded Mr. Chesebrough seems to have had a larger share of her pure affections than her first lover (if Mr. Chesebrough was the first) was ever able to obtain.

This was the way the evidence stood when we commenced our investigations and our testimony. Our evidence in relation to the Baltimore marriage occupies a very large portion of the proofs in the case (Vol. VII, fols. 573 to 612; Vol. VIII, fols. 514 to 932; Vol. IX, fols. 79 to 201). We show that, according to the laws of Maryland at the time of this marriage, an official license was an absolutely necessary prerequisite to a marriage. It was a criminal offence to celebrate a marriage in that State without one (Vol. IX, fols. 71 to 201; Vol. VII, fols. 573 to 600; Vol. VIII, fols. 781 to 800). A full and complete record of such licenses was kept in the proper office, in Baltimore We found these records, for all these years, intact and perfect. We searched them from beginning to end and put them all in evidence, and it clearly appeared that no such license had ever been granted to these parties (Vol. VIII, fols. 514 to 753).

Redgrave *v.* Redgrave, 38 Maryland, 93.

She had testified that they had stopped at Barnum's Hotel, in Baltimore, at the time they went there to be married. We found the records of Barnum's Hotel, and found that they did not stop there, at that time or any other time, at least under their real names (Vol. VII, fols. 601 to 609, and Vol. VIII, fols. 631 to 666).

We found that the local newspapers were careful to publish every marriage that occurred in Baltimore, and no notice of any such marriage had ever appeared in any newspapers (Vol. VIII, fols. 802 to 863).

We found and showed that, according to the Maryland laws at that time, none but clergymen could perform marriage, and the ceremony could be celebrated only in *facie ecclesiae*. We called as witnesses clergymen of all denominations who were living and preaching in Baltimore at that time, and they testified to the universal custom among clergymen to require the exhibition of a license, and that no clergyman would solemnize a marriage without one. In fact, it was a State's prison offence so to do (Vol. IX, fols. 79 to 201; Vol. VIII, fols. 727 to 800, 863 to 932).

In short, we showed, as clearly and conclusively as it was ever possible to prove a negative of this nature, that the whole story of the Baltimore marriage was a lie.

The making of these investigations and the taking of this testimony occupied considerable time, and during all this time the woman Josephine Cregier continued to live with the complainants' counsel, Mr. Averill, at his place at Sand Lake, New York, and these reports of our doings in Baltimore, and of the testimony we were taking there, were continually coming to her ears. She saw the net tightening around her. She knew that she had testified falsely. She saw that we were leaving no stone unturned to show that it was a falsity, and finally she repented, or at least was seized with

wholesome fear of retribution. She voluntarily came to us and asked to be allowed to go again upon the stand, to retract the lie she had told and to tell the truth. Whether her confession was brought about by genuine penitence or by fear of the consequences of her crime, or whether it was a combination of both motives, is immaterial. She is recalled as a witness, and her testimony, under the name of Josephine Cregier, is found in Vol. VII, fols. 805 to 929. She says (fols. 808 to 812):

> "Q. What is your name? A. Josephine Cregier.
>
> Q. Are you the same person who formerly testified in this case under the name of Josephine Chesebrough? A. I am.
>
> Q. Were you ever married? A. No, sir.
>
> Q. Was the statement you made on your former examination, that you were married to Blazius M. Chesebrough, and that he was your husband, correct? A. No, sir.
>
> Q. Was there any marriage ceremony or marriage agreement between you and Blazius M. Chesebrough? A. No, sir.
>
> Q. Was anything ever said between you on the subject of marriage? A. Nothing more than that he promised, after his mother's death, to marry me.
>
> Q. Do you mean that the promise was made after his mother's death? A. No, sir; before his mother's death.
>
> Q. Did he tell you or promise you when he would marry you? A. Not till after his mother's death.
>
> Q. Did you ever see him after his mother's death? A. No, sir.
>
> Q. Did you ever visit Philadelphia, or any place, in company with Blazius M. Chesebrough and a child? A. No, sir.
>
> Q. Did you ever, at any time during the lifetime of Blazius M. Chesebrough, consider yourself or believe yourself to be his wife? A. No, sir."

She was subjected to a most rigorous cross-examination, during which there was brought to our

knowledge for the first time the Nashville affidavit, the Nashville syndicate agreements and the Nashville letters, all of them, in my view of the case, of very great importance, as showing the origin and growth of this case, and the history and development of this attack on the Chesebrough property. She realizes her position fully, but she persists in the retraction of her previous testimony and in her emphatic assertion that there was never any marriage, or pretext or claim of marriage; and on her redirect-examination she testifies again (fols. 913 to 928):

"Q. What did you mean when you said, in answer to Mr. Arnold's question, that you lived with Mr. Chesebrough as his wife? A. Well, I was obliged to take his name or I could not live in a respectable boarding-house. *I knew and he knew that I was not his wife.*

Q. Do you remember the occasion when you first stayed with him or commenced to live with him? A. Yes, sir.

Q. Where was it? A. No. 16 Bond street, New York City.

Q. Did Mr. Chesebrough have his room there at that time? A. Yes, he did.

Q. And was there also in the same building a dancing school? A. Yes.

Q. What one? A. Sirocco's Dancing Academy.

Q. When you went to his room for the first time where did you go from? A. From the hall down stairs; the dancing hall.

Q. Had you ever met him before except at the dancing school? A. No, that is the first place I met him at.

Q. Had you ever met him before, except at the dancing school, before the time you first went to his room? A. No, sir.

Q. What time in the day was it? A. I don't remember whether day or night; I think it was night.

Q. Did you spend the night with him at his room at that time? A. Yes.

Q. Did you go to his room for the purpose of spending the night, or staying with him? A. Yes.

Q. From what time did you commence to live with him? A. Six weeks or a couple of months after that night, after the first night that I slept there, as near as I can recollect.

Q. Where did you pass the time during those six weeks or two months? A. At home; at my mother's.

Q. At the time that you commenced to live with him, where did you live with him? A. 16 Bond street, the same place.

Q. At the time you commenced to live with him, some six weeks or two months after the night you first stayed with him, had anything been said between you on the subject of marriage? A. No, sir.

Q. How long after that, if ever, was that subject spoken of? A. Some time after that; I can't remember exactly. He made a promise that he would marry me after his mother's death, and that was all that was said between us, as near as I can recollect; it was a long time ago.

Q. Did you at any time while living with Mr. Chesebrough consider yourself his wife or believe yourself to be his wife? A. No, sir.

* * * * * * * *

Q. So far as you know, did he at any time consider himself to be your husband, or believe himself to be your husband? A. No, sir.

Q. Was there ever at any time any change in the relationship between you from the time you first visited his room, as you have mentioned, till the time you ceased to live with him? A. No.

Q. Did you ever use the name of Chesebrough as your own name, or call yourself Mrs. Chesebrough, from the time you left Mr. Chesebrough, as you have stated, up to the time you were called upon in Nashville by the complainant, as you have testified, and her husband? A. Not to my recollection."

And this is the end of the story of Josephine's marriage.

It is clear that her first story, that there was a marriage, cannot be believed. As Mr. Justice Lacombe says:

> "Certainly, in view of her admitted perjury, the complainant cannot insist that her testimony affords direct proof of a marriage."

Mr. Justice Lacombe also says:

> "If her later testimony were to be accepted, there need be no further inquiry."

It may make but little difference whether her whole story is disregarded or her second story alone credited. The burden of proof is upon the complainant (as we have already shown and as Mr. Justice Lacombe held in language so clear that even our opponents are convinced and raise no exception), and a failure to prove a marriage on their part is as fatal to their case as would be absolute proof on our part that there was no marriage. Mr. Justice Lacombe does not decide whether her second story should be credited or not, for the reason that he finds abundant and convincing evidence in the case outside of this that there was no marriage.

I submit, however, that, in view of all the circumstances and all the evidence in the case, it is clear that the last testimony of Josephine is the truth, and that it should be accepted as true. I should not, of course, contend, in view of the fact that she has contradicted herself and testified first one way and then the other, that her testimony, standing alone, uncorroborated by other evidence and unconfirmed by the surrounding circumstances, was worthy of credit; but when it appears, as it does, to be thoroughly consistent with the conduct of her whole life and with all the other facts and circumstances disclosed in the case, and when it is corroborated, as it is, by the abundance of oral and written testimony which we produce, it must be believed.

We have before us Josephine's whole life; we have the fact that the relations between her and Mr.

Chesebrough were certainly, originally, meretricious; we have the story of their strange and vicious life together. We have the fact that, when they tired of this union she separated from him, as coolly and as cavalierly as a harlot separates from her paramour in the morning after a night's debauch, and went to another lover's arms with as little ado as she first surrendered herself to his; we have the fact that for the eight years thereafter that he lived she made no claim upon him and had no communication with him; that after his death fourteen years elapsed during which no claim was made upon his magnificent estate, either by her or her daughter; and then we have the story disclosed in the records of this Nashville syndicate and this Nashville plot, and the history of the litigation, then for the first time set in motion; we have the fact that she has always lived as a single woman and that he lived and died as a single man, and that his estate was settled and his property distributed without objection or without question, as if there had never been any Josephine born. Her first story contradicts her whole life, her whole history, and everything that he or she had ever done before or have done since. Her second story is consistent with everything. When we are told something that is entirely probable and natural, consistent with all we know and everything we can learn otherwise, we believe the person who tells it, without so much regard to their personal character. It is only when the story is improbable and unnatural, at variance with recognized facts and surrounding circumstances, that we inquire most closely as to the source from which it comes.

Reading Josephine's testimony in the light of her life, and Mr. Chesebrough's, in the light of all the recognized facts and surrounding circumstances, in the light of all we know and all we have otherwise learned, and considering the disreputable origin of this claim and the disreputable manner in which it has been prosecuted, and seeing all through,

as we can, the hand of Clarence Buel and of George Norris, the one a professed perjurer and the other a promised profiter by perjury, the mind must be, it would seem, irresistibly drawn to the conclusion that Josephine at the last told the plain and simple truth.

It is the second story only that has the ear-marks of verity.

XI.

What is marriage?

The question I am now proposing is, not how to establish a marriage by evidence, but what are the elements essential to constitute a marriage, and which must be proved before the Court can find, as a matter of fact, that a marriage exists.

There is a great deal of loose reasoning on this subject in the popular mind, and some of this reasoning has affected the bar, and perhaps sometimes found its way upon the bench.

The evidence necessary to prove the fact is confounded with the fact itself. Marriages have been proven sometimes (where no better proof was available) by evidence of cohabitation, reputation, recognition and of acts which indicated the existence of the marital relationship. But it is not cohabitation or reputation or recognition or marital acts which constitute a marriage. These are only evidence, more or less strong, that an actual contract of present marriage has been actually made between the parties at some previous time.

The laws of different countries prescribe different ways in which a marriage contract may be solemnized, recorded or made public. But the laws of all civilized countries agree in this particular:

that it is the contract itself which is the basis of marriage, and upon which the existence or non-existence of the marriage depends, and that, *without such a contract, there is no marriage.* At some moment in the lives of the two persons they must have agreed that from thenceforth and forever, so long as they both shall live, they will bear to one another the well-established relationship, and perform for one another the well-known duties, of husband and wife. Their minds must, at that moment, have met upon this agreement of present marriage. Before that moment they did not bear the relationship of husband and wife. After that moment they did.

It may not be possible in all cases to locate this exact moment, or to show just what was then said and done to indicate the meeting of the minds of the parties. But, to establish a marriage, there must be, in every case, sufficient, credible and convincing proof that there has been such a moment, and that the minds of the partles did then meet upon this agreement of present marriage. There is no such thing as a marriage without a time or without a place, a marriage in the air. Marriage is not the result of any process of gradual development from an unmarried to a married status. We do not imperceptibly slide from one condition into the other. There is always a distinct period of time when the parties have crossed the Rubicon, and thenceforth and forever assumed changed relations, each toward the other.

> "*Cohabitation and reputation alone are not marriage.* They are merely circumstances from which a marriage may sometimes be presumed."
>
> Appeal of Reading Fire Insurance and Trust Company, 113 Penn., 204.

"The law is that marriage is a civil contract, complete by the agreement of the par-

ties, without ceremony, but there must be an actual, present contract of marriage, or a contract to take effect at a future time, which must be consummated before the parties can sustain the relation of husband and wife.

The contract may be inferred from the conduct of the parties, by cohabitation, and by holding themselves out to the world as man and wife, and the circumstances of cohabitation and reputation should be submitted to the Court or jury as testimony from which a marriage in fact may be inferred, *but those circumstances do not of themselves constitute marriage.* They are evidence merely of a marriage contract, and are liable to be rebutted by other testimony."

Davis *v.* Brown, 1 Redfield, 259.

"Where it is shown that there was no marriage ceremony, proof of cohabitation as man and wife will not prove marriage. It is necessary that a contract, consented to by both parties, should be in some way shown."

Goldbeck *v.* Goldbeck, 18 N. J. Equity, 42.

"The parties must not only live together as man and wife, *but to become man and wife there must be a purpose in beginning so to live.*"

Brinckley *v.* Brinckley, 50 N. Y., 197.

"The intercourse with plaintiff began illegally, and is presumed so to continue, and can be transformed only by an *actual consent to marriage.*"

Foster *v.* Hawley, 8 Hun, 68.

"As long as the law requires a marriage in order to make children legitimate, I do not think the courts have the right to perform a ceremony or make a contract of marriage for the parties."

Wright *v.* Wright, 48 How. Pr., 1.

"Courts cannot marry parties by mere presumption without their consent. In the absence of consent, the status of marriage is never created by any government. The law compels none to assume the matrimonial status. Without assent, no statute or constitution can create this status."

Cartwright *v.* McGown, 121 Ill., 388.

"Living with the deceased however long, or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. *Prescription or copulation, either singly or combined, can never constitute marriage.*"

Holmes *v.* Holmes, 1 Abb. U. S., 525.
Floyd *v.* Calvert, 53 Miss., 37.

"A common law marriage is valid, but this is not one to constitute marriage. *To do so the parties must consent to be husband and wife presently.*"

Peck *v.* Peck, 12 R. I., 485.

XII.

Reputation, recognition and cohabitation—when evidence of marriage.

We have already shown that such evidence as this should not be admitted, or, if admitted, should be looked upon with the very gravest suspicion and subjected to the severest tests wherever more satisfactory evidence is available, and that in this case there is no excuse or occasion at all for resorting in any degree to this kind of evidence.

But even where the circumstances or necessities of the case are such that this kind of evidence may

properly be referred to, there are certain well established features which must attend it in order to make it, even in such a case, of any value whatever.

The cohabitation must be matrimonial in its character and not illicit, and it must be such as carries with it a natural belief that it results from marriage only. The reputation must be complete and not partial. The recognition must be universal. The whole circumstances must be such as lead one to the conclusion that it results from an actual marriage. The treatment must be such as a man gives to his wife, and not to his concubine.

In the Yardley Est., 75 Pa., 207, the Court say:

> "The case depends on the alleged cohabitation and reputation of marriage, but it is a misnomer to call the visits of Howard Yardley to Elizabeth Sittens cohabitation. It was lacking in its chief element, constancy of dwelling together. His habitation was evidently at the house of his own family, which he had never left, and where he continued until his death, and was buried from it—the place where he was taxed and from which he voted. Elizabeth Sittens was unknown to his relatives, except as his shirt-woman; never visited them, and did not follow his remains to the grave. His visits to her were evidently of an irregular kind, and, though frequent and continued for years, they bore no resemblance to married life. *Loose notions seem to prevail as to what cohabitation is. It is not a sojourn nor a habit of visiting, nor even a remaining with for a time. None of these fall within the true idea of cohabitation, as a fact presumptive of marriage. Neither cohabitation nor reputation of marriage, nor both, is marriage.* When conjoined they are evidence from which a presumption of marriage arises; *the legal idea of cohabitation is that which carries with it a natural belief that it results from marriage only.*
>
> To cohabit is to live or dwell together, to have the same habitation, so that where one

lives and dwells, there does the other live and dwell always with him. The Scotch idea conveys the true idea, perhaps, better than our own—'the habit and repute' of marriage. Thus when we see a man and woman constantly living together, where one is dwelling the other constantly dwells with him, we obtain the first idea or the first step in the presumption in marriage; and when we add to this that the parties so constantly living together are reputed to be man and wife, and are so taken and received by *all* who know them both, we take the second thought or second step in the presumption of the fact of marriage. *Marriage is the cause; these follow as the effect. When the full thought contained in these words, cohabitation and reputation of marriage, is embraced, we discover that an inconstant habitation and a divided reputation carry with them no full belief of an antecedent marriage as the cause. The irregularity in these elements of evidence is at once the reason to think there is irregurity in the life itself the parties lead;* unless attended by independent facts which aid in the proof of marriage. Without concomitant facts to prove marriage, *such an irregular cohabitation and partial reputation of marriage avail nothing in the proof of marriage.*"

In Commonwealth *v.* Stump, 53 Pa., 132, it is said:

> "The presumption of marriage only arises from *matrimonial* cohabitation. Where the parties not only lived together as man and wife, but held themselves out to the world as sustaining that honorable relation to each other, *mere illicit intercourse raises no presumption.*"

In Rose *v.* Clark, 8 Paige, 573, the Court use the following language:

> "To presume from the fact of cohabitation that there has been an actual marriage, *it must be matrimonial, and be so begun, and not illicit.* It is not the fact alone that

raises the presumption, but the character of the fact. The parties must not only live together, as do man and wife, *but to become man and wife there must be a purpose in beginning so to live*, and they must hold themselves out to the world as thus related. And the courts will not, by testimony that is not clear and explicit, that is not general and supported by other circumstances, *nor by reputation for marriage that is divided*, raise such a presumption. And the presumption is weakened where the relation of the parties is secret or concealed, unless an adequate and controlling motive is presented."

Justice *v.* Lang, 52 N. Y., 323.
U. S. *v.* Leany, 26 Fed. Rep., 535.
Bank of W. S. *v.* Corcoran, 2 Pet., 121.
Stover *v.* The People, 56 N. Y., 315; 6 Pet., 632.
Clements *v.* Moore, 73 U. S., 299.
Hale *v.* Smith, 78 N. Y., 480.
Lincoln *v.* Frank, 105 U. S., 614.

"The cohabitation must not have been meretricious in its inception, else proof of it is of little or no value."

Brinckley *v.* Brinckley, 50 N. Y., 174.

"The presumption in favor of the legality of the connection is rebutted by the fact that it was at first illicit; the presumption, then, was that, having been illicit in its origin, it was likely to continue so. *If it was subsequently changed, at what time did it become lawful?*

"There is, perhaps, as much reason to believe that their subsequent connection was of the same character, as that a marriage had in fact taken place."

Clayton *v.* Waddell, 4 N. Y., 230.

"This intercourse having begun illegally is presumed so to continue."

Smith *v.* Smith, 4 Paige, 432.

"A connection confessedly illicit in its inception is presumed to continue so."

Badger *v.* Badger, 88 N. Y., 546.

"If cohabitation is meretricious in its origin, the presumption of morality and innocence of the parties is at once overcome."

Cartwright *v.* McGown, 121 Ill., 388.
O'Gara *v.* Eisenlohr, 38 N. Y., 296.

"The beginning was illicit, and as no subsequent marriage is clearly shown, illicit relations are presumed to continue."

Appeal of Reading Fire Insurance and Trust Co., 113 Penn., 204.

"A concubine is often held out as a wife to conceal relation and to prevent criminal prosecution."

Cartwright *v.* McGown, 121 Ill., 388.

"Cohabitation and a reputation of being husband and wife are usually considered together, in questions concerning the proof of marriage—the one being in a certain sense the shadow of the other. Some of the authorities favor the idea that reputation of itself may be received as sufficient proof, *prima facie, but it must be uniform and general; and if there is a conflict in the repute it will not establish the marriage.*"

1 Bishop on Marriage and Divorce, fifth edition, 438.

"Cohabitation and reputation are at best only presumptive proofs, and when one of these foundations is withdrawn, is too weak to build a presumption on. There is good sense in the Scotch law, by which cohabitation alone is considered insufficient and which requires in addition habit and repute, because it is said that *parties may eat live and sleep together as mistress and keeper, without any*

intention of entering into marriage. Cohabitation is simply the first step, and when that is accompanied by an acknowledgment of the matrimonial relations and treating each other as a man and wife and holding one another out to the world as such, there may reasonably be a presumption founded on *all* these facts that the intercourse is lawful instead of meretricious. These things *all* go to form the circumstances upon which reputation is grounded. Reputation consists of the belief and the speech of the people who have an opportunity to know the parties and have heard of and observed their manner of living. *But cohabitation may be notoriously illicit and known to be so in the neighborhood in which the parties reside. In which case the law would surely not presume that it furnished any presumption or evidence of marriage The reputation of the parties and their mode of life, founded on facts, would repel it, and a presumption in their favor would assert what was well known to be a falsehood.* Therefore, cohabitation and reputation must both exist before the presumption can be raised. If parties cohabit together as man and wife, and treat each other as such, and acknowledge the existence of that relationship, and thereby acquire the reputation of being married, among the people, the fact of marriage may well be presumed; but if the facts show the contrary, and their reputation is that they are not married, no such presumption can be indulged."

Cargile *v.* Wood, 63 Mo., 501.

"Marriage may doubtless be proved in civil cases, other than actions for seduction, by reputation, declarations and conduct of the parties; *but where reputation is relied on, that reputation to raise the presumption of marriage must be founded on general, not divided or single opinion. And where reputation in such cases is divided, it amounts to no evidence at all.* And so with respect to the declarations of the parties. The value of such declarations as evidence will always de

pend on circumstances under which they were made."

Barnum *v.* Barnum, 42 Md., 291.

"That this woman for a time bore the relation of concubine or kept mistress of the deceased would seem to be quite certain, and all his pretense of marriage with her could only have been made as a blind, to screen their illicit conduct, and as a means of deception as to their true relations to each other."

Redgrave *v.* Redgrave, 38 Md., 93.

The evidence of recognition, reputation and cohabitation must be such as will enable the Court to clearly distinguish between a concubine and a wife. The holiest of human relations cannot be proved by acts which are easily simulated by the libertine and the harlot.

XIV.

The admissibility of the seduction suit record.

Mr. Justice Lacombe holds that this is admissible, in the following language (Vol. IX, folios 1275 and 1276):

"The complainant objected to the admission of the record and judgment roll in this seduction suit. It is well settled that in cases of pedigree, family conduct is admissible evidence from which the opinion and belief of the family may be inferred. The judgment roll may fairly be considered competent evidence of family conduct. But if it is not, and if all evidence of the declarations of Rachel Cregier were excluded from the case

> as hearsay, then there would be left practically no evidence of repute in the Cregier family, except that given by Almira Sisson, which, as she was of such tender age at the time, is certainly of but little weight."

No exception is taken to this ruling of Mr. Justice Lacombe, and no assignment of error is made in relation to it (Vol. IX, fols. 1297–1304).

Even if this ruling of Mr. Justice Lacombe was erroneous, the error not having been assigned by the appellants, would be disregarded (Rule 11 of this Court and Rev. Stat. of the U. S., sec. 997).

But Mr. Justice Lacombe was clearly right. The record and all evidence relating to the suit is admissible on several distinct grounds:

1. They, themselves, have put upon the record a vast mass of testimony, consisting of the declarations, in one form or another, of Rachel Cregier, which they supposed to be favorable to them. Mrs. Emeline Irving, Mrs. Robert Franklin and Mrs. Margaret Ann Cregier testified to nothing else of any importance, except to Mrs. Cregier's declarations.

If her declarations, which are supposed to be in favor of the marriage, are admitted, certainly her declarations which explain these, and which show that there was no marriage, are admissible. If the fact testified to by Mrs. Irving (Vol. 1, fols. 1140–1141), that Mrs. Cregier introduced Mr. Chesebrough to her as "Josie's husband" is evidence, then the fact that Mrs. Cregier is shown subsequently to have known and declared that Mr. Chesebrough was not Josephine's husband, becomes important and admissible. Mrs. Robert Franklin, as their witness, and in answer to their questions, testified as follows (Vol. 1, fols. 1272–1276):

> "Q. Did you ever hear Rachel Cregier or Josephine Chesebrough or any member of your family talk about his being the husband of Josephine? A. Yes, sir; certainly.

Q. You have? A. Oh, it was always understood that he was her husband and that he was Lolie's father.

Q. Whom did you ever hear say anything about that, and what did you hear them say? Did you ever hear Rachel Cregier say so? A. Yes; I have heard her frequently speak of Leonora's father and of Josephine's husband.

Q. What, to your best recollection, have you heard Rachel say about George being her husband? A. The conversation was this: After I had matured, and become a woman, they talked about Josephine's fate; that she had been very unhappy in her marriage, and matters of that kind; and she said that while George Chesebrough was a gentlemanly man when he was sober, that when he was intoxicated, he was a fiend; something of that nature. That is all I remember of our conversation.

Q. Did you ever hear any conversation of Rachel wherein she stated that George and Josephine were husband and wife, or was there anything pertaining to that? A. Oh, yes.

Q. Give us that conversation. A. I can't tell you positively the conversation.

Q. You need not give us the words but the substance. A. It is in my memory that she spoke of him as being Josephine's husband; and after Josephine went away he searched for her and tried to find her, and he was very indignant, because he thought she knew where Josephine was."

If this was admissible then certainly the evidence, that at about this time Rachel Cregier knew and declared in a much more formal way that Mr. Chesebrough was not Josephine's husband, and that the relationship between them was illicit from beginning to end, and that he was never anything to her except a seducer and a paramour,—ought to stand.

If the conversation which Mrs. Margaret A. Cregier testifies she had with Mrs. Rachel Cregier (Vol. I, fols. 1403-1404) is admissible, then the

evidence of Rachel Cregier's declarations explanatory of these or interpreting them, is also admissible.

The complainants cannot found their case upon testimony of this character, and then say that similar testimony on our side must be excluded.

They cannot drag in Rachel Cregier as a factor whenever anything she has said or done is supposed to militate in their favor, and keep her out whenever what she has said or done displeases them. They cannot blow hot and cold at the same time.

2. If this evidence is not admitted on our side, then the larger part of the evidence which the complainants have introduced must be stricken out, and they have no case left. If, in addition to the testimony of Josephine, there is stricken out of the case everything that relates to Rachel Cregier, there would be nothing left of the complainants' case to talk about.

3. The evidence in relation to this seduction suit is admissible as part of the *res gestæ*.

The complainants have made a part of their case all that occurred during the period of the relationship, whatever it was, between Chesebrough and Josephine, and all that occurred during the early life of Leonora, so far as it seems to help them.

This seduction suit simply completes the picture which they have partially drawn. The early history of the case would be incomplete without it.

4. It is admissible as proof of pedigree.

Greenleaf on Evidence, Section 103, says:

> "But it is now settled that the law resorts to hearsay evidence in case of pedigree upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family."

Section 104 says:

> "The term pedigree, however, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. Thus an entry made by a deceased parent or other relative in a Bible, or in any document or paper, is regarded as a declaration of such parent or relative in the matter of pedigree."

In Section 106 Greenleaf says:

> "Under this head may be mentioned family conduct, such as a tacit recognition of relationship, as admissible evidence from which the opinion and belief of the family may be inferred, resting ultimately upon the same parties as evidence of family tradition."

In the Berkeley Peerage, case 4, Camp 401, the question was as to the legitimacy of certain children. The plaintiffs, being children of the Earl, filed a bill against other children of the Earl, later born and by a different mother, to perpetuate the testimony of the marriage of the Earl with the plaintiffs' mother. The evidence was an entry by the Earl in the family Bible stating that one of the plaintiffs was his eldest son, born in lawful wedlock.

Chief Justice Mansfield, delivering the unanimous opinion of the twelve judges, said that such an entry, whether made in the Bible or elsewhere, would be admissible as a declaration on the question of pedigree.

See also Elliott *v.* Pearsall, 1 Peters, 328.

In Jewell *v.* Jewell, 1 Howard, 219, it was held by the Supreme Court of the United States that declarations of a deceased husband of one of the plaintiffs who claims land as the heir of her father,

to the effect that plaintiff's parents were not married, are admissible in evidence.

The Court, in their decision, say as follows:

> "The first point in the first exception is upon the rejection of the declarations of Simons, the deceased husband of one of the plaintiffs. It is true that Simons cannot be presumed to have known, of his own personal knowledge, the particular fact of which he was speaking, and must have made the statement upon information derived from others. He does not appear to have named the person from whom he obtained his information, or to have stated that his knowledge was derived from a general understanding and reputation in his wife's family. But the knowledge of events of this description most generally exists in every family; hence, the declaration of one of its members is admissible, although he does not mention the source from which he derived his information; and such declarations are equally admissible whether his connection with the family is by blood or marriage."

See also Vowles *v.* Young, 13 Vesey, 140, and
Stein *v.* Bonner, 13 Peters, 209.

In Eisenlord *v.* Clum, 38 N. Y. State Reporter, 446, a decision made in June, 1891, the New York Court of Appeals hold that hearsay evidence as to pedigree is just as admissible in a case like this, where a question of legitimacy is involved, as in any other case.

His Hon. Judge Peckham, writing the opinion, says:

> "It seems to me that they (the declarations) are competent as hearsay evidence in a case of pedigree. Such a case is a well known and recognized exception to the general rule excluding hearsay evidence. This case involves, without doubt, a question of pedigree simply. It is what is termed in the books a purely genealogical controversy. Peter O.

Eisenlord is, upon the plaintiff's claim, the common ancestor of all the parties, while the defendants only deny the plaintiff's relationship to him. *The sole question involved is as to this relationship of the plaintiff, and that depends upon the fact of a marriage having taken place between Eisenlord and the plaintiff's mother before his birth.* The exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. Matters of pedigree consist of descent and relationship, evidence of declarations of particular facts, such as births, marriages and deaths.

In cases of pedigree, hearsay evidence of persons who, from their situation, were likely to know, is admissible when the person making them is dead.

* * * * *

Upon questions of pedigree, *i. e.*, in a controversy merely genealogical, hearsay evidence is allowed as to the time of birth of a certain party, as to a marriage, death, *legitimacy* or the reverse, consanguinity generally and particular degrees thereof and of affinity.

* * * * *

For the purpose of proving a marriage in cases of pedigree, where the object is to trace relationship, the declarations of deceased members of the family are competent.

* * * * *

A birth from a single woman, a birth from a married woman, a death, a marriage, is a particular fact or a single act which, of course, is provable by hearsay (hearsay from a proper source) on a question of pedigree."

It certainly does not lie in the complainants' mouths to object to this evidence. They attempt to prove that Leonora is the *legitimate* child of Blazius and Josephine by the statements and declarations of members of both families, including the

statements and declarations of this same Rachel Cregier. We certainly can meet this evidence with declarations of the same persons to the contrary effect.

5. It is to be noted that this judgment record is not simply the declaration of Rachel Cregier, who is the plaintiff, but also the declaration of Mr. Chesebrough, who is the defendant. It is an adjudication in a case in which he was a party, that there was no marriage, and that Leonora was an illegitimate child. And as such adjudication, as to him certainly, if not as to Leonora, it is final and conclusive, and it is at least equivalent to his statement that there was no marriage, and that she was illegitimate.

Indeed, his conduct in relation to this case is the very highest kind of a declaration to this effect.

The tacit declarations arising from conduct are just as admissible and quite as important and convincing as explicit declarations in words.

Greenleaf on Evidence, Section 106.

If this charge was untrue, that there was no marriage, and that he was guilty of seduction, and that Leonora was an illegitimate child, Mr. Chesebrough would certainly have defended the suit and shown what the truth was. Even if a default, through some mistake, was taken against him, he would have applied to open the default, and the Court would have been quick to grant his application. If there had been a marriage, and Leonora was legitimate, it would have been a complete answer to the plaintiff's suit, and he certainly would have had no difficulty at that time in proving it, if such was the fact.

His course in this matter, in allowing default to be taken against him, in failing to apply to have the default opened, and in paying up the judgment which was entered against him, is the strongest,

clearest and most convincing declaration which could have been made upon his part that there was no defence to the action; that there was no marriage; that Leonora was illegitimate, and that he was simply a seducer and not a husband.

Men do not allow judgments of this kind to be taken, and to stand, against them, and do not pay damages or verdicts of this character, voluntarily, unless the facts against them are so overwhelming that there is no possibility of defence.

6. This judgment record is admissible on the question of reputation.

The direct evidence of a marriage being out of the case with Josephine's confession and recantation, the complainants have nothing left except evidence which they claim shows reputation of marriage. They ask the Court to find that Blazius and Josephine were husband and wife, not because they prove the fact to be so, but because, as they allege, they were reputed to be such.

This judgment record, and the testimony as to what transpired upon the trial, is all evidence tending to show that there was no such reputation as the complainants claim, or if there was such a reputation anywhere, at any time, that it was not general and universal, as the law requires, but at the most, only temporary and partial, such as the law is not satisfied with.

When we come to proof of reputation a very wide field is opened.

You cannot prove what the general reputation, as to a given fact, was, ordinarily, by any one witness or any one item of evidence. The whole truth is brought out only by gleaning such evidence as we can get from all available sources. One source from which we can get it is certainly the public records, and where they show, as they do show in our case in every instance, facts utterly inconsistent with a marriage, or with a reputation of mar-

riage in the community, it becomes the very highest kind of evidence on this question.

It would be exceedingly difficult to believe that there was in this community such a general reputation that Blazius and Josephine were husband and wife as would amount to evidence of marriage, while this public record existed, showing affirmatively and in the most emphatic and conclusive manner possible that there was no marriage, and that this child Leonora was illegitimate.

7. It is admissible as evidence to contradict Mrs. Almira Sisson, who was called as a witness by the complainants, and confronted with the record of this suit, and with what she testified to upon this trial in relation to it. It is always permissible to confront a witness with his or her testimony upon a previous occasion, and impeach and contradict them by it, and to introduce their previous testimony or their previous statements for that purpose.

Mrs. Sisson testified upon this trial in the Superior Court to the effect that Josephine was not married to Mr. Chesebrough; she now testifies that he was. Her previous testimony is admissible to contradict her, and the record of the suit in which she so testified necessarily comes in as a part of the record by which we show the contradiction.

XV.

The testimony of Almira W. Sisson.

The testimony of this witness (Vol. III, fols. 3490–4110) covers more than 200 printed pages. It is one of the longest examinations in the case, and is, I think, the most extraordinary evidence given under oath which history records.

Mrs. Sisson is the sister of Josephine. She testifies that she was born in 1846, and was therefore eight years old in 1854, when it is alleged that Josephine was married. If, as Josephine said in her Nashville affidavit, the marriage was in 1853, then Almira was only seven years old at the time. She was nine years old in 1855, when it is alleged the child in Saratoga was born. eleven years old in 1857, when Leonora was born, and twelve in 1858, when Josephine left her alleged husband to join her fortunes to those of Mr. Jackson (Vol. III, fols. 349 to 396 and 3883).

Her testimony, called out by the complainants on her direct-examination (Vol III, pages 1164 to 1271), covers 107 printed pages in length and is all in reference to matters which are claimed to have occurred between 1853 or 1854, and 1858, during the period when the witness was from seven to twelve years old. The amount of memory which she displays and of knowledge which she claims as to the facts occurring during her babyhood is certainly very remarkable. As a witness for the complainants she is most precocious.

If this was the only point to be made against her testimony, it would be sufficient, and we might safely dismiss her with the remark of Mr. Justice Lacombe (Vol. IX, fol 1276) that :

> "As she was of such tender age at the time, her testimony is certainly of very little weight."

But her age is not the worst thing in the way of giving credibility to her testimony.

The record of the seduction suit brought by Rachel Cregier against Mr. Chesebrough in 1859, and tried in 1861 in the Superior Court of the City of New York, is in evidence (Vol. IX, fols. 25 to 28).

This record shows (Vol. IX, fol. 75) that this same person, then Almira Cregier, was a witness for her mother upon that trial.

The deposition of Mr. James C. Voorhees, one of the counsel who tried the case, is in evidence (Vol. VIII, fols. 1-215), and this shows the substance of what Almira and her mother then testified to. This trial was in 1861, when the witness was fifteen or sixteen years old. It is certainly reasonable to suppose that she would be able to remember better what transpired then than what transpired when she was eight years old.

It cannot be said that this suit was a matter of little importance, which would attract no attention, or be easily forgotten. It was a suit brought by the witness's mother, involving not only a considerable sum of money, but also a large amount of family history and family good name. It was a suit in which her mother claimed damages for the alleged seduction of the daughter Josephine by Mr. Chesebrough, and which seduction, it is alleged, resulted in the birth of this Leonora. It must have marked an epoch in the family history.

In this suit Almira and her mother were called on to swear, and it is the uncontradicted testimony that they did swear, that there was no marriage or pretence of marriage between Josephine and Mr. Chesebrough, and that the relationship was altogether meretricious. This allegation was the essence of the plaintiff's case, and must have been clearly proven, or she could not have recovered.

Mr. Voorhees's testimony shows that both Almira and her mother gave such testimony upon that trial, and the Court will see that they must have given it, or they could not have proved their case. This testimony which Almira gave at that time was certainly of the utmost importance, and it was proper, reasonable, and to be expected, that, having testified now in this case directly opposite to what she testified then in that case, she should be called upon to make some explanation as to her self-contradiction.

Mrs. Sisson's testimony upon this point cannot

be stated so as to do full justice to the subject without quoting it at some length. We will do so.

We quote as follows (Vol. III, fols. 4012 and following):

"1017 x-Q. Your mother sued Mr. Chesebrough several times, did she not? A. I don't know that she did.

1018 x-Q. You know that she sued him more than once, do you not? A. I don't know; I know she sued him once for board for himself and family.

1019 x-Q. Is that the only suit you ever heard of? A. *I decline to answer.*

1020 x-Q. Why do you decline to answer? A. *Counsel for complainants advises me so to do.*

1021 x-Q. Do you intend to follow his direction? A. Why, yes.

1022 x-Q. Did you ever hear that your mother sued Mr. Chesebrough for his seduction of Josephine? A. *I decline to answer.*

1023 x-Q. Why do you decline to answer? A. *Because counsel for complainants advises me so to do.*

1024 x-Q. And who is counsel for complainants? A. Mr. Norris.

1025 x-Q. Were you a witness in a suit brought by your mother, Rachel Cregier, against Mr. Chesebrough for the seduction of Josephine? A. *I decline to answer.*

1026 x Q. For what reason? A. *Counsel for the complainants directs me so to do.*

1027 x Q. You intend to follow his direction, do you then? A. Why, yes.

1029 x-Q. On the 18th day of March, 1861, were you a witness in a case in the Superior Court of the City of New York in which Rachel Cregier was plaintiff and George M. Chesebrough was defendant? A. *I decline to answer.*

1030 x-Q. Why do you decline to answer? A. *Because counsel for complainants directs me so to do.*

1031 x-Q. On that day, in that court, in the suit I have named, did you swear that your sister Josephine always said to you that she was not married? A. *I decline to answer.*

1032 x-Q. On that day, in the Superior Court, did you swear that you saw Mr. Chesebrough cut Josephine with a dagger at the Smithsonian House? A. *I decline to answer.*

1033 x-Q. Why do you decline to answer? A. *Because counsel for complainants directs me so to do.*

1034 x-Q. Did you, on that day, in the Superior Court of the City of New York, swear that you saw him strike her—saw Mr. Chesebrough strike Josephine with his fist? A. *I decline to answer.*

1035 x-Q. Was your mother a witness in a suit in which she was plaintiff and Mr. Chesebrough was defendant in the Superior Court? A. *I decline to answer.*

1036 x-Q. Did you hear your mother examined as a witness in the Superior Court of the City of New York, on the 18th day of March, 1861? A. *I decline to answer.*

1037 x-Q. Why do you decline to answer? A. *Because counsel for complainants directs me so to do.*

1038 x-Q. Did you hear your mother swear, on the 18th day of March, 1861, in the Superior Court of the City of New York, that there was never any marriage between her daughter Josephine and the defendant, Mr. Chesebrough? A. *I decline to answer.*

1045 x-Q. Do you know Mr. James C. Voorhees? A. No, sir.

1046 x-Q. Did you ever hear of such a man? A. *I decline to answer.*

1047 x-Q. Why do you decline to answer? A. *Because counsel for the complainants directs me so to do.*

1048 x-Q. On the 18th of March, 1861, in the Superior Court of the City of New York, did you hear your mother asked this question: Did your daughter Josephine Cregier have a child? when was it born? and did you hear your mother answer, October 9, 1857, at my house? A. *I decline to answer.*

1049 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1050 x-Q. Did you hear this question asked your mother: How old was she at this time? and in reply to that question did you hear your mother answer: She was only fifteen or

sixteen when Mr. Chesebrough took her from my house, and not more than twenty when the child was born? A. *I decline to answer.*

1051 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1052 x-Q Did you hear your mother asked this question: Was there ever any marriage between your daughter Josephine and the defendant? and in reply to that question did you hear your mother say: No, sir; they were not married; he seduced her first in 1853? A. *I decline to answer.*

1053 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1054 x-Q. On that day, in that Court, did you hear your mother asked this question: When did you first learn that your daughter was pregnant and about to give birth to a child? and in reply to that question did you hear your mother say: Some time in the summer; that was in 1857; I think it was in July? A. *I decline to answer.*

1055 x-Q. Upon that day, in that Court, did you hear your mother asked this question: Where is your daughter Josephine now? and did you hear reply to that question: In South Carolina? A. *I decline to answer.*

1056 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1057 x-Q. On that day, in that Court, did you hear your mother asked this question: When did she leave your house? and did your mother in reply to that question answer: On the 16th day of November, 1857? A. *I decline to answer.*

1058 x-Q. For what reason? A. *Counsel for the complainant directs me so to do.*

1059 x-Q. On that day, in that Court, did you hear your mother asked this question: Has your daughter Josephine lived with you since the 16th day of November, 1857? and did your mother in reply to that question answer: No? A. *I decline to answer.*

1060 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1061 x-Q. On that day, in that Court, were you asked, after having been sworn as a wit-

ness: How old are you? and did you answer: Sixteen? A. *I decline to answer.*

1062 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1063 x-Q. On that day, in that Court, were you asked this question: What relation are you to the plaintiff and to Josephine Cregier? and in reply did you answer: Mrs. Rachel Cregier is my mother, and Josephine Cregier is my sister? A. *I decline to answer.*

1064 x-Q. For what reason? A. *Counsel for the complainant directs me so to do.*

1065 x-Q. On that day, in that Court, were you asked the following question: Have you ever seen the defendant and Josephine Cregier together? and in answer to that question did you reply: Yes, sir: I saw them occupy rooms together at the Smithsonian House, and at the hotel corner of Ninth street and Broadway, New York City? A. *I decline to answer.*

1066 x-Q. For what reason? A. *Counsel for complainants directs me so to do.*

1067 x-Q. On that day, in that Court, were you asked this question: Had you seen them at your mother's house before that? and in reply to that question did you answer: He used to come and take her out sometimes? A. *I decline to answer.*

1068 x-Q. For what reason? A. *Counsel for the complainant directs me so to do.*

1069 x-Q. On that day, in that Court, were you asked the following question: Was your sister married to Mr. Chesebrough? and in reply did you say: No, sir; never? A. *I decline to answer.*

1070 x-Q. Why? A. *Counsel for the complainant directs me so to do.*

1071 x-Q. And were you then asked by the Judge: How do you know that? and did you reply: Well, my sister Josephine always said she was not married, and did not want to be; and my mother, she told me after the baby was born that Josephine was not married, and my mother was very sorry she had done as she had. Mr. Chesebrough never spoke of her as his wife, unless it was to deceive somebody who he thought was too inquisitive about it? A. *I decline to answer.*

1072 x-Q. Do you know whether Dr. Groves was sworn as a witness in the Superior Court of the City of New York on the 18th day of March, 1861? A. *I decline to answer.*

1073 x-Q. Did you hear Dr. Groves give any evidence in the Superior Court of the City of New York, on the 18th day of March, 1861? A. *I decline to answer.*

1074 x-Q. For what reason? A. *Counsel for the complainant directs me so to do.*

1111 x-Q. Did you ever hear your mother and Dr. Groves talk about any suit? A. *I decline to answer.*

1112 x-Q. Did you ever see your mother in any court in the County Court House, New York City? A. I don't know that I did.

1113 x-Q. What is your best recollection about that? A. I don't recollect.

1114 x-Q. Do you mean to say that you have no recollection of seeing your mother in the County Court House, New York City, at any time? A. I don't know where the County Court House is.

1115 x-Q. In any court house; in any court? A. I don't remember.

1116 x-Q. Did you ever see Dr. Groves in a court house in New York City; in any court house or in any court? A. No; I don't remember seeing him.

1117 x-Q. Did you ever hear your mother testify as a witness in any court in New York City? A. *I decline to answer.*

1118 x-Q. For what reason? A. *Counsel for the complainant directs me so to do.*

1119 x-Q. Were you ever in any court in New York City? A. I don't know that I was.

1120 x-Q. Do you mean that you have no recollection on the subject? A. No; I don't recollect.

1121 x-Q. Do you recollect of being a witness in any court? A. I don't know that I was.

1122 x-Q. Do you mean to say you have no recollection of ever being a witness in any court?

Mr. Schley: We are waiting for an answer (after a pause). I shall have to ask you

again for an answer to the question, Mrs. Sisson.

We have already waited a long time, Mrs. Sisson; won't you give us an answer?

The Witness: Well, I needn't answer if I don't wish, need I?

Mr. Norris, Complainants' Counsel: You may ask the question to be read to you, and either decline or answer it; I have no objection to the question.

1123 x-Q. (Repeated.) Do you mean to say you have no recollection of ever having been a witness in any court?

Mr. Norris: The best way for you is to answer the question; it is a proper one.

The Witness: I DON'T WANT TO ANSWER.

1124 x-Q. Why don't you want to answer? A. *Because I don't.*

1125 x-Q. Is that the only reason you have for not answering it?

Mr. Norris: If you have got any reason now you should state it.

The Witness: I have already answered that I don't remember.

1126 x-Q. Do you still say you don't remember? A. No.

1127 x-Q. Then you do remember? A. I don't remember.

1128 x-Q. You have no recollection whatever of ever being a witness in any suit other than the present examination; do I so understand you?

No answer.

1229 x-Q. We are waiting for your answer, Mrs. Sisson. A. I have told you I didn't recollect.

1164 x-Q. Your mother sued him (Mr. Chesebrough) in 1858, did she not?

Objected to; the record is the best evidence.

Mr. Schley: The record is in evidence.

Mr. Norris: She may decline to answer it.

Mr. Schley: The record is already in evidence.

1165 x-Q. Did your mother sue him in 1858?

Mr. Norris: I object to that question then on the ground that it is an unfair question,

because the record is not referred to as an exhibit.

1166 x-Q. Will you answer the question? A. Must I answer?

Mr. Norris: Yes.

The Witness: You say in 1858?

1167 x-Q. Yes; 1858. A. I don't know.

1168 x-Q. You don't know whether your mother sued him in 1858? A. No. Yes, she did sue him in 1858 for board for himself and family

1169 x-Q. What time in 1858 did she sue him? A. *I decline to answer.*

1170 x-Q. Why do you decline to answer? A. *Counsel for the complainant directs me so to do.*

1171 x-Q. Why did she sue him?

No answer.

1172 x-Q. Why did she sue him?

The Witness: Am I to answer that?

Mr. Schley: You will do as you please about it, I suppose. I asked you the question; I expect you will answer it. A. Why, she sued him for board for himself and family.

1173 x Q. Why did she sue? A. Because he didn't pay his board; sometimes he would pay, and then again he would not.

1174 x-Q. Was that after he had left her house? A. No, he hadn't left.

1175 x Q. He hadn't left? A. No.

1176 x-Q. She sued him while he was still an inmate of the house, then? A. He was there at the house.

1177 x-Q. Did it make him angry? A. Yes, he was angry."

Of the board suit in 1858 she seems to have memory enough; she had already testified very fully and without any hesitation, embarrassment or defective memory about it on her direct-examination in answer to Mr. Norris's questions (Vol. 3, fols. 1374–1382). It is as to the later seduction suit only that her memory is a blank.

"1180 x-Q. Did your mother say she had waited long enough for her money? A. I *decline to answer.*

1181 x-Q. For what reason? A. *Counsel for complainant advises me so to do.*"

At this point (Vol. III, fols. 4063-4065) we announce that we are satisfied that the testimony of this witness, with all her contradictions, evasions, defects of memory and refusals to answer, shall stand, and that the examination be closed; but the complainants' counsel seems to have had an idea that as it then stood it might not make good reading in court, and applies for an adjournment. The date of the examination from which we have quoted is April 16th, 1887. There was not only one adjournment, but repeated adjournments up to June 1st, a month and a half later, when Mrs. Sisson is produced again, and it is intimated to us that, if we will repeat our questions, the witness will answer. This is what takes place (Vol. III, fol. 4068).

"Mrs. ALMIRA W. SISSON, being further cross-examined, testifies:

By Mr. Schley:

1182 x-Q. Were you a witness in a case in the Superior Court, in the City of New York, on the 18th of March, 1861? A. *Since I was here last I have thought the matter over and I have a faint recollection of being witness in a suit, but I don't remember where it was or when it was.*

1183 x-Q. Was it a suit brought by your mother, as plaintiff, against George M. Chesebrough? A. *I don't remember whether it was or not.*

1184 x-Q. Was it a suit brought by your mother for the seduction of your sister, Josephine? A. *I do not remember anything of the suit at all.*

1185 x-Q. Do you remember being sworn as a witness in court at that time? A. *I remember being a witness in a suit, but I don't know when it was or where it was.*

1186 x-Q. Is your memory good? A. *It is a great many years since I was fifteen years old, and I don't remember at all.*"

(No doubt it is true that it is a great many years since she was fifteen years old; but it was not as many years since she was fifteen years old as it was since she was eight years old, and her memory was remarkably good as to the most trifling details that occurred then.)

"1187 x-Q. You don't remember things that happened when you were fifteen years old? A. *No; very little that happened.*

1188 x-Q. Do you remember whether you saw your mother in court? A. *No, sir; I do not remember that.*

1189 x-Q. Were you ever a witness more than once in court? A. *Not that I remember; no, sir.*

1190 x-Q. Do you know whether it was a suit in which your mother was interested? A. *That I don't know.*

1191 x-Q. Who asked you to go in court? A. *I don't remember that.*

1192 x-Q. Whom did you go to court with? A. *That I don't remember.*

1193 x-Q. Did you hear your mother swear on the 18th day of March, 1861, in the Superior Court of the City of New York, that there never was any marriage between her daughter Josephine and the defendant, Mr. Chesebrough, in any suit? A. *I have no recollection of anything of the kind.*

1194 x-Q. Have you any recollection of having been present in any court in the City of New York in 1861? A. No, sir; I don't know any of the courts at all.

1195 x-Q. You say you were present in the court and swore as a witness? A. *I have a faint recollection of being a witness, but I don't know what court it was in.*

1196 x-Q. It was in court, was it? A. *I think it was, but I don't remember where.*

1197 x-Q. Nor who went there with you, nor how you came to go there? A. No, sir; I have no recollection of it at all; I know I was

in court, but where or what Court it was I have no recollection of at all.

1198 x-Q. You don't recollect whether you heard your mother swear what I have just read to you or not? A. *No, sir; I don't recollect it.*

1199 x-Q. You don't recollect whether your mother was there? A. No, sir.

1200 x-Q. On the 18th day of March, 1861, in the Superior Court of the City of New York, did you hear your mother asked this question: 'Q. Did your daughter, Josephine Cregier, have a child; when was it born?' and did you hear your mother answer: 'October 9, 1867, at my house?' A. *I have just said that I didn't remember hearing my mother testify to anything; I don't remember it at all.*

1201 x-Q. You don't remember whether that question was asked your mother, or whether she answered in this way? A. *I do not remember it.*

1202 x-Q. In that court, at that time, did you hear your mother asked this question: 'Q. How old was she at this time?' and in reply to that question did you hear your mother answer: 'She was only fifteen or sixteen when Mr. Chesebrough took her from my house, and not more than twenty when the child was born?' A. *I have no recollection of hearing anything of the kind.*

1203 x-Q. In that court, at that time, did you hear your mother asked this question: 'Q. Was there ever any marriage between your daughter Josephine and the defendant?' and in reply to that question did you hear your mother say: 'No, sir; they were not married; he seduced her first in 1853.' A. *I do not remember hearing anything of the kind.*

1204 x-Q. Do you remember whether your mother was asked that question? A. *I do not remember anything about it; I don't remember hearing it at all.*

1205 x-Q. On that day, in that court, did you hear your mother asked this question: 'Q. When did you first learn that your daughter was pregnant and about to give birth to a child?' and in reply did you hear your mother say: 'Sometime in the summer;

that was in 1857; I think it was in July?' A. *I have no remembrance of anything of the kind.*

1206 x-Q. Do you remember hearing any such question asked? A. *I do not remember it.*

1207 x-Q. Do you remember hearing any such question asked your mother? A. *No, sir; I have no remembrance of it whatever.*

1208 x-Q. And you don't remember hearing any such answer? A. *No, sir; I don't remember hearing it at all.*

1209 x-Q. Were you asked in that court, on that day, after you had been sworn as a witness: 'How old are you?' A. I know I was sixteen years old at the time, but I don't know whether I swore to that or not.

1210 x-Q. Were you asked on that occasion: 'How old are you?' A. *I don't remember that I was.*

1211 x-Q. Did you answer: 'Sixteen'? A. *I don't remember whether I did or not; I was sixteen at that time.*

1212 x-Q. On that day, in that court, were you asked: 'Q. What relation are you to the plaintiff and to Josephine Cregier?' and in reply did you answer: 'Mrs. Rachel Cregier is my mother, and Josephine Cregier is my sister'? A. *I have no recollection of it, of answering that.*

1214 x-Q. Have you any recollection of having been asked any such question? A. *No, sir; I don't remember any question that was asked me.*

1215 x-Q. Were you asked questions? A. I don't know whether I were or not. I suppose, if I was a witness, I must have been asked questions, but I don't remember any of them at all; I can't remember them.

1216 x-Q. Whom did you see in court that you knew? A. *I don't remember; I couldn't name one person.*

1217 x-Q. Did you see Dr. Groves there? A. *I don't remember.*

1218 x-Q. On that day, in that court, when you were a witness, were you asked the following question: 'Q. Was your sister married to Mr. Chesebrough?' and in your reply did you say: 'No, sir; never'? A. I don't remember saying anything of the kind.

1219 x-Q. Do you remember being asked such a question? A. *No, sir; I do not.*

1220 x-Q. Do you remember whether you were asked such a question? A. *I do not remember.*

1221 x-Q. Do you remember whether you made such an answer? A. *I do not; I have no recollection of it whatever.*

1222 x-Q. Do you remember whether you were asked any questions by the Judge? A. *I do not remember.*

1223 x-Q. Do you remember whether you were asked: 'Q. How do you know that your sister Josephine was not married?' and did you reply: 'Mr. Chesebrough never spoke of her as his wife, unless it was to deceive somebody who he thought was too inquisitive about it'? A. *I do not remember.*

1224 x-Q. Do you remember whether you were asked such a question? A. *I do not.*

1225 x-Q. Do you remember whether you made such a reply to any question? A. *No, sir; I do not remember.*

1226 x-Q. Do you know whether Dr. Groves was sworn as a witness or was a witness in that trial? A *No, sir; I do not.*

1227 x Q. Do you know whether your mother was a witness in the same trial? A. *I do not remember.*

1228 x-Q. Why did you, upon the last hearing, swear that you had no recollection that you had ever been in court? A. It was so long ago, and I have only a faint recollection of it now; I couldn't remember then at all.

1229 x-Q. What has brought it to your recollection since that time? A. I have had some time to think about it.

1230 x-Q. What have you thought about it? A. I remember being—as I have just said, I have a faint recollection of being a witness in a suit, but what it was I don't know.

1231 x-Q. Let us have all the recollection you have about it? A. I have already given you all the recollection I have.

1232 x-Q. I don't understand that you have given us any recollection. A. That is all I recollect; that I was witness in a suit, and that is all I remember.

1233 x-Q. Do you remember whether in

that suit you testified that your sister Josephine was never married? A. *I do not remember anything of the kind.*

1234 x-Q. Do you remember whether you testified in that suit that your sister Josephine was not married to Mr. Chesebrough? A. *I do not remember.*

1236 x-Q. Do you remember, before you were sworn as a witness, as you have testified, that you talked with any counsel with regard to the case? A. No, sir.

1237 x-Q. Did you not, before that trial, tell Mr. Stephen B. Brague and Mr. James C. Voorhees, your mother's counsel, that your sister Josephine was not married, and had never been married? A. *I do not remember anything of the kind.*

1238 x-Q. Do you remember whether you did or did not? A. *I have no recollection of it whatever*

1239 x-Q. Do you remember whether you made any such statement to either of those gentlemen? A. *I do not remember.*

1244 x-Q. Do you remember things that occurred when you were eight years old better than you do matters that occurred when you were fifteen or sixteen? A. No, sir; I remember some things when I was eight years old, and I remember some things when I was sixteen years old.

1245 x-Q. What do you remember when you were sixteen years old? A. I couldn't name everything that I remember.

1246 x-Q. Name one thing that you remember? A. I remember I left school when I was sixteen years old and went to work; that was my first——

1247 x-Q. What time of year was that? A. I hardly remember that.

1248 x-Q. Were you working when you were in Court, as you have now testified? A. I don't remember whether I was or not."

This is the witness who remembered so well and testified so easily as from her own personal knowledge, and with the fullest detail and minutiæ regarding things which happened when she was only eight years old, and told the story exactly as she

supposed the complainants' counsel desired it to be told. She had evidently been instructed to give an answer to those questions about that trial that she remembered nothing about it, and to stick to that firmly; but there were other subjects about which she had not received her instructions, and therefore she is not prepared to answer them.

> "1309 x-Q. Have you read the portion of the testimony which appeared in any newspaper, which purported to be taken on this trial? A. I decline to answer.
>
> 1310 x-Q. Have you read any account of the testimony taken in this case of Arnold *v.* Chesebrough in any newspaper? A. I decline to answer."

Several things are very clear.

1. The witness deliberately lied when she said she had no recollection of the seduction suit in the Superior Court, and of testifying on the trial of that suit.

It cannot be possible that so important an event, occurring when she was 15 or 16 years old, could have escaped her memory.

2. When she has testified as to her recollection of what occurred when she was eight years old she is likewise deliberately lying. It cannot be possible that she could have remembered what occurred then with such fullness and minutiæ of detail as she pretends.

3. She either deliberately lied in the Superior Court in 1861, when she testified that there was no marriage, or she deliberately lies in her testimony in this case in relation to a marriage.

4. It is evident that the information which she pretends to be giving us from the witness stand has been acquired by her very recently; that she

has learned her story since this suit was commenced, and is trying to tell it as best she can, and this is undoubtedly the reason why she declines to state, in answer to cross questions 1309, 1310, whether she has read the testimony which has been heretofore taken in this case. She undoubtedly has read it, and her testimony contains the internal evidence that it is based upon what she has read and heard since the trial commenced.

For instance (fols. 3605, 3606):

> "484 Q. Did you ever hear of any of the circumstances connected with that memorable event at Saratoga (that is, the birth of the child)? A. *Yes; I heard who the nurse was.*
>
> 485 Q. Who did you hear that from? A. From George Chesebrough.
>
> 486 Q. What was the nurse's name? A. Fanny Post."

Fanny Post is the present name of the nurse, who, it is asserted, officiated in Saratoga, and she had been called as a witness and testified nearly a year before Mrs. Sisson was called, and testified at considerable length (Vol. I, fols. 19–107); but Fanny Post was her married name, and she was not married until 1862. Her maiden name was Fanny Wiley (Vol. I, fols. 64–111) and this witness, Mrs. Sisson, had not seen Mr. Chesebrough since 1858, and had seen her sister Josephine only once since 1862.

If Mr. Chesebrough told her the name of this nurse, as she said he did, he could not have told her that the name was Fanny Post, because it was not then her name, and it cannot be presumed that he had any telepathic knowledge of the name of the person she was to marry some five or six years afterwards.

But if she had been cramming from the testimony which had been already given in the case, and which had been furnished her to enable her to

do this cramming, she would very naturally give the name this way, as it appeared in the testimony she had had before her.

The astute counsel for the complainant was quick to see this point, and attempts to remedy it at fols. 3785 and 3786, of Vol. III, and tries to get an explanation from the witness as to why she used the name of Fanny Post instead of Fanny Wiley.

I submit, in view of the other circumstances connected with the testimony of the witness, that her explanation is exceedingly lame.

The testimony of the witness is full of other inconsistencies, improbabilities and contradictions, which I might mention. One more occurs to me now.

At fol. 3624, question 554, she testifies:

> "554 Q. Did you see her (that is, her sister Josephine) before and during the year 1855? A. No; she was away a greater part of the time that year (that is, away from New York, the greater part of that year.")

At another place, having forgotten this, she testifies that they were at the Smithsonian Hotel, the Clinton Hotel and Mrs. Thistle's lodgings during most of the year 1855, and were only away for a short time when the child was born at Saratoga (Vol. III, fols. 3564-3569, 3637-3642).

At fols. 3536 and 3537 she gives the time when, it is alleged, Josephine and Mr. Chesebrough went away, came back, and announced their marriage as August, 1854, being able to fix upon the month of August, because, she says, it was very warm weather. On another day she fixes it as late in the fall, in the cold weather of that year (Vol. III, fols. 3871-3874).

She is contradicted on many other points, many times by the testimony of the complainants' own witnesses.

She testifies that Josephine very often visited

Mrs. Margaret Chesebrough, and that she frequently went with her (Vol. III, fols. 3701–3710). Josephine, afterwards called as a witness for the complainants, says that she never saw Mrs Margaret Chesebrough but once, and that was across the street, when Mrs. Chesebrough did not see her, and that she never visited her or spoke to her at all (Vol. III, fols. 4167 and 4168, Vol. VII, fols. 922–925). And all the other credible testimony in the case on both sides shows that Mrs. Margaret Chesebrough did not know Josephine, had not seen her, and probably was not aware of her existence. (She evidently gets her clew here from thoroughly discredited Mrs. Fitzgerald, who had testified some months previously (Vol. II, fols. 2827, 2847–2850).

She testifies to a long period of courtship between Josephine and Mr. Chesebrough (Vol. III, fols. 3523–3529). Josephine's testimany, as their witness, shows that the courtship could not have lasted in duration more than about one hour and thirty minutes, for he enjoyed all the sweets of her person in his room on the floor above on the same evening when he first met her at the dancing school. (Here the clew is evidently from the testimony of Mrs. Franklin (Vol. I, fol. 1295), and she is trying very hard to corroborate her on the courtship theory hinted at, in the testimony of that witness).

We quote here Mr. Voorhees's testimony as to what Almira stated to him before she was called as a witness in the seduction suit and what she testified to upon the trial of that suit, and we call the attention of the Court to its utter and absolute inconsistency with her testimony in the present suit.

There can be no escape from the proposition that she deliberately lied either at one time or the other. Mr. Voorhees testifies Vol. VIII, fols. 27–48:

> "Q. Did you have any conversation with Almira Cregier before the trial with regard to the suit? A. Yes, sir.

Q. State any such conversation or conversations, if you remember them? A. I saw her and her mother at Mr. Brague's office, and asked her questions in regard to the suit She told me that her sister Josephine had a child by Count Chesebrough—she called him Count—at her mother's house. The child was born there, she said. That the Count had taken her sister away and seduced her; that she went to see her sister at the Smithsonian House, and that she, Josephine, had been beaten, as Josephine had told her, Almira, by the Count. I asked her if that allegation in the complaint in regard to her being cruelly treated was true, and she told me that so far as her sister had told her it was true. She also said that she had asked her sister Josephine if she was married to the Count, and she, Josephine, said that she was not married to him. I asked her who she meant by the Count, and she said Chesebrough, the defendant in this action that I was talking about, Cregier *v.* Chesebrough. I also saw her and her mother in the court room on the morning of the trial in the court room, and I think we went into a room just off the court room on one side, a private room, and I also think I saw them the morning before the day of the trial in the court room. I had the same conversation with her, and she reiterated the same story that she told me all the way through, she and her mother.

Q. Do you remember what testimony was given by Almira Cregier, the daughter of the plaintiff in that action, upon that trial? A. I can't say that I remember all the testimony that she gave. I remember part of it, I think the greater part of it.

Q. State all that you remember of such testimony? A. She said that plaintiff in this action was her mother, and that she was the daughter of plaintiff; that Josephine Cregier was her sister. She said it was the same person mentioned in the complaint; she said she knew the defendant in the action; she said her sister was delivered of a child at her mother's house; she said that she saw her sister Josephine at the Smithsonian House,

> corner Broadway and Houston street, New York City, and that her sister told her she had been beaten by the defendant ; that she asked her sister Josephine if she was married to the defendant. Her sister told her no, she was not married to him."

The testimony which her mother, Rachel Cregier, gave upon that trial, in the presence of these witnesses, has already been quoted, and is substantially to the same effect as Almira's testimony.

There can be no doubt but that Mr. Voorhees truthfully recites the substance of the testimony of both witnesses. He is corroborated by the record in the suit, by all the circumstances surrounding it, and we know that testimony substantially to this effect must have been given, or the plaintiff's case could not have been made out, and a verdict could not have been obtained, and he is in no wise contradicted, either by Almira Cregier or by any other witness.

We find, then, in relation to this witness, Almira Sisson:

1. That she remembers, with unprecedented minuteness and detail, the most trifling things that happened when she was eight years old, supposing that her testimony in that regard will benefit the complainants.

2. That she first declines to testify concerning, and then refuses to remember, the most important matters which occurred when she was an adult, evidently supposing that, if she testifies to this, it will injure the complainants.

3. That she contradicts herself in her testimony on this trial on many points.

4. That she is contradicted on many other points by the complainants' own witnesses, as well as by

our witnesses, and by all the surrounding circumstances.

5. That she gave testimony in the seduction suit in the Superior Court at a time when all the matters to which she was testifying must have been quite fresh in her memory directly to the contrary on all material points to what she now testifies, and that there is no possible explanation except that she deliberately lied at one time or the other.

I do not hesitate to assert that no witness was ever more thoroughly discredited.

XXII.

The Storms Family.

The complainants attempt to break the overwhelming array of our testimony as to the reputation in the Chesebrough family by introducing as witnesses Mr. Christian S. Storms, Mrs. Martha Fitzgerald and Miss Eliza M. Storms, children of Gen. Henry Storms, a cousin of Mrs. Chesebrough's.

The bias of these witnesses against us is apparent all through their testimony. Mrs. Fitzgerald goes far out of her way, and still farther from the truth, as we shall show hereafter, to vent her spite upon Mr. Charles A. Chesebrough, and upon his dead first wife.

She tries to make out that this woman was Mr. Charles A. Chesebrough's concubine and not his wife, and that Mrs. Margaret Chesebrough disapproved of the relationship and disliked the woman very much (Vol. II, fols. 2826 and 2898 and following), as she naturally would, if such, in fact, was the relationship.

This testimony is shown to be absolutely false,

and to have no foundation whatever, by the unanimous testimony of numerous witnesses, as we shall see when we come to it.

She makes out Mr. Charles A. Chesebrough to be an inhuman monster in his treatment of his mother, and this we shall also show to be without the slightest basis in fact; it is *pure* fiction.

And in numerous other ways she shows very clearly the spirit which animates her.

Christian S. Storms and Miss Eliza Storms show the same spirit, but keep it a little deeper down and do not bring it to the surface quite as prominently as Mrs. Fitzgerald does.

The motive for all this spite may not be entirely transparent from the evidence, but I think the Court will be able to get from the testimony some glimpses of it. These witnesses were relatives of the Chesebroughs, and the burden of their testimony is that there was some recognition in the Chesebrough family of the connection of Blazius with this woman Josephine, and they try very hard to make out that this relationship was a marriage. But if we had nothing else against them, we could rely upon the testimony of Blaise Ryer, Mrs. Mary E. Haley, Mrs. Maria Hegeman, Miss Amelia R. Moore, Martin Brill, Oscar Hudson, Mrs. Martha M. Bowers, Mary Roose, Arminius Aikin, Jeremiah V. Spader, Margaret G. Spader, Dr. Frederick A. Putnam, Mr. F. W. Geisenheimer, to contradict and discredit them most thoroughly and completely upon this point.

But we do not need to call in the aid of these other witnesses to dispose of the testimony of these members of the Storms family. They most thoroughly discredit themselves.

The order in which these witnesses from the Storms family was examined is as follows: Christian S. Storms first, Mrs. Fitzgerald second, and last, but not least, Eliza M. Storms. Our knowledge of them and their history progressed as their testi-

mony went on, and our opponents undoubtedly wished that the testimony had been closed before we got to know as much about them as we did.

There is a remarkable similitude in the testimony of these three witnesses which is very suggestive; still in the details there is some little variation, but in one thing they all entirely agree (it was the burden of their song); that their father, General Henry Storms, was the most intimate friend Blazius M. Chesebrough ever had. There was no limit to the intimacy which seemed to exist between these two men. In life they were boon companions, and the General hovered around the deathbed of Blazius holding aloft a will in his own favor for Blazius to execute in his dying hours. They (Blazius and the General) poured into one another's ears their inmost thoughts as freely as school girls ever confide to one another their mental vaporings; they spent the larger part of their lives together in the sweet society of one another.

Mr. Christian S. Storms and Mrs. Martha J. Fitzgerald, all through their testimony, bring this out whenever they get the slightest opportunity or excuse. Miss Eliza M. Storms does the same. We quote simply one of the many instances of this (Vol. III, fols. 3014, 3016).

> "62 x-Q. Your father was intimate with him (Blazius M. Chesebrough)? A. *Very* intimate. He wouldn't have anything to do with any one else but father.
>
> 63 x-Q. He and your father were very friendly? A. Particularly so; yes, sir.
>
> 64 x-Q. How long before this did this intimacy continue? A. Father always protected the boy.
>
> 65 x-Q. How long did the intimacy between your father and Blazius M. Chesebrough continue? A. *All Moore's life.*
>
> 66 x-Q. During all Moore's life? A. Yes, sir. He looked to father more after the death of his father, more than to any one else.

67 x-Q. When was it his father died? A. I couldn't tell you that; I have forgotten about when his father died. In 1829, I think.

68 x-Q. After his father's death, from that time down to Moore's death, your father and he were very intimate? A. Yes; father was very near to him all the time; he wouldn't have any one else near him, and he would send for him at Fort Washington "

In other connections this same witness and Mrs. Fitzgerald, as well as the brother, Christian S. Storm, tell how, whenever Blazius had any trouble of any kind, he always sent for General Storms and poured into his willing ear all the griefs and troubles which he ever had.

How much of this testimony was strictly true and how much of it was exaggeration it is impossible to tell. At the time the witnesses were thus testifying of the relationship between General Storms and Blazius they were undoubtedly fully impressed with the belief that it was for the interest of the complainants, whose case they were favoring in every way in their power, that they should make out that this intimacy was as close as possible. and how far their testimony is colored by their bias in that regard we cannot fully know. But there is no doubt that there was on this particular subject much truth in what the witnesses were testifying to, and that General Storms and Blazius were quite intimate with one another, and it is probable that the General knew more of the real life of Blazius M. Chesebrough than most people did, perhaps more than any one else did.

There is another subject on which these three witnesses all agree, and that is that their father was the fountain head from which the knowledge of their family, and their knowledge as to Blazius M. Chesebrough's life, and his relationship with this woman, was derived. They are quoting from their father almost all the time, and it is very clear that their knowledge is mainly, if not entirely, derived from

him. Take General Storms out of their testimony and there would be little left. The importance of the evidence which these witnesses give, so far as it is important at all, is not in what they say as of their own knowledge, but what they testify to as to coming from their father.

And the effort is to score a big point for the complainants by getting upon the record evidence that General Henry Storms, a relative of the Chesebrough family, a some time confidant of Mrs. Margaret Chesebrough, and an all time confidant, friend and associate of Blazius M. Chesebrough, was aware of the true relationship between Blazius and Josephine, and knew it to be marital.

It was a lie, and we can see no other explanation of it than that the witnesses knew it to be such. But their inveterate hatred of Mr. Charles. A Chesebrough, and their strong desire to do anything they could to injure him and help this complainant, and whatever other motives we know not of, induced them to father the lie.

But it is one of the inconveniences of lying, that truth scatters all along its pathway, every now and then, guide posts pointing the way, and the lie is always running into these guide posts. So it was here. It is a remarkable characteristic of this case that whenever we find anything on paper in such a shape that it canuot be altered and cannot be lied about, it speaks for us. Whenever Blazius M. Chesebrough, or Josephene Cregier, or old Mrs. Chesebrough, or Rachel Cregier, or any of the Chesebrough or any of the Cregier family, or any of their friends or relatives, put anything about this matter on paper. it is always something that is inconsistent with the theory of marriage.

General Storms did not omit to put in writing, on record, and under oath, his testimony to the truth in this regard, and that record now comes up to confute and confound the perverted, distorted and false statements of his children.

After Blazius M. Chesebrough's death, there was some delay in taking out letters of administration on his estate, and General Henry Storms, claiming to be a creditor, makes an application for letters as such, and that application is sworn to and filed in the Surrogate's office, according to the practice of that Court.

The application and the oath are found in Vol. IX, fols. 742–759.

The petition was in the usual form, and contains this statement.

> "And your petitioner" (General Henry Storms)"has been informed and verily believes that said deceased" (Blazius M. Chesebrough) "left surviving Charles A. Chesebrough, a brother, of full age, residing at 211 East 18th street, N. Y. City, his *only next of kin; that said deceased was unmarried*, and was at, or immediately previous to his death an inhabitant of the County of New York, and left no father or mother surviving."

We expect upon the argument to have the original petition before the Court, and it will be noticed that, although the body of it is a *printed blank*, the statements important to us, to wit, that Mr. Charles A. Chesebrough is the only next of kin, and that the deceased was unmarried, are *written* in, showing that there could be no mistake as to what was intended.

We had not discovered this affidavit at the time that Christian S. Storms and Mrs. Fitzgerald were on the witness stand, but we did get word of it when Eliza Storms was under cross-examination, and that part of her testimony during which she is is confronted with this affidavit and statement of her father, and questioned in relation to it, we commend to the careful consideration of the Court. It is found in Vol. III, fols. 3000–3279, and further continued in Vol. VII, fols. 929–960.

For convenience we here make some quotations (Vol. III, fols. 3075 and following):

"307 x-Q. Will you look at the paper I now show you, at the signature at the bottom, and see if you recognize the signature? A. Yes, sir.

308 x-Q. Whose signature is it? A. Father's.

310 x-Q. Upon the second page I show you another signature—can you tell me whose signature that is? A. My father's.

312 x-Q. You may read it and see what it is. A. I don't know; what is it?

313 x-Q. If you will read it you will see what it is. A. I don't want to bother my brain with it; what is it?

The witness read the paper shown her.

The Witness: That is father's signature, sir.

314 x-Q. Your father's signature at the foot of the first page? A. Yes, sir.

315 x-Q. And it is your father's signature at the foot of the affidavit on the second page? A. Yes, sir.

316 x-Q. Did you ever see that paper before? A. No, sir; I never saw it."

(The paper is marked in evidence, and is found in Vol. IX, pp. 239–240. It is the petition of Henry Storms for letters of administration upon the estate of Blazius M. Chesebrough, deceased, and his affidavit to the petition. The first page of the document, as shown the witness, which is signed "Henry Storms," is the petition; the second page, which is also signed by him, is the affidavit to the petition. It is marked Defendants' Exhibit 5, January 29, 1887).

"317 x-Q. Have you read the paper which has been shown you, and which is marked Defendants' Exhibit No. 5, January 29, 1887? A. Is that it?

319 x-Q. Do you notice the date of it? A.

Well, that was two years after Moore's death — 1868.

320 x-Q. It is dated in 1868, you notice, do you not? A. Yes, sir.

321 x-Q. February 18th, 1868? A. Yes, sir.

322 x-Q. That was about two years after Moore's death? A. Yes; father made this application to be compensated for what he had done for Moore.

324 x-Q. Your father did what? A He made application to be compensated for what he had done for Moore.

325 x-Q. And he made application to take out letters of administration on Moore's estate, did he not? A. I don't know what he did; I don't recollect; I have forgotten.

326 x-Q. Your father claimed to be a creditor of B. M. Chesebrough, did he not? A. Yes; mother was sending him delicacies. I don't know that that had any bearing upon it.

327 x-Q. You knew at the time that your father was taking some proceedings to collect some money against Moore's estate? A. Yes; there was something.

328 x-Q. But for what purpose he made application to the Surrogate to take out letters of administration—— A. I didn't know that he did.

329 x-Q. You don't know what proceedings he took? A. I do not.

330 x-Q. You knew he took some proceedings? A. Knew there was something done, and he became discouraged, and then he was getting on in years, and it was worrying him.

331 x-Q. He didn't follow it up? A. He didn't follow it up, no, that I knew.

332 x-Q. He became discouraged before he collected the money? A. That he knew that Charles would not accede to anything—something of that kind. I have forgotten the circumstances. I knew father thought that he ought to be compensated.

333 x-Q. You knew he took some proceedings? A. Yes, sir.

334 x-Q. You didn't know what the proceedings were? A. No, sir.

335 x Q. He talked with you about the proceedings? A. Yes, sir.

336 x-Q. He told you he was taking some proceedings? A. Yes, sir.

337 x Q. Do you remember about when it was he told you he took these proceedings? A. It was after his death.

338 x-Q. About this time in 1868, the date of this affidavit? A. I rather think it was—or 1867.

339 x-Q. The latter part of 1867, or the early part of 1868? A. Yes, sir.

340 x-Q. Did he talk with you a number of times about it? A. Yes, sir; that he thought he ought to be compensated.

341 x-Q. And that he was taking proceedings to that end, of some kind? A. Yes, sir.

342 x-Q. *Did your father, in February, 1868, know whether or not Blazius M. Chesebrough had been a married man?* A. I COULDN'T ANSWER THAT, SIR. IT WASN'T TALKED OF THE LATTER PART OF HIS LIFE—ABOUT THE EARLY PART OF MOORE'S LIFE.

343 x-Q. Haven't you testified that he talked with you frequently about the time that Moore died? A. Yes, he spoke about Moore being married previously to that.

344 x-Q. Haven't you testified that he talked with you frequently about it at the time of Moore's death? A. Yes, about the child. Yes, he spoke about the child. Yes, he spoke about the child being at the funeral. He came and told us the child was at the funeral. IT WAS RATHER A DELICATE SUBJECT; FATHER NEVER SPOKE TO US ABOUT IT.

345 x-Q. Why was it a delicate subject? A. Well, I suppose he thought for me——

346 x-Q. *Why was it he thought it was a delicate subject before you?* A. HE DIDN'T LIKE TO SPEAK OF IT — A FATHER TO A DAUGHTER.

347 x-Q. You thought it was a delicate subject because he was a father to a daughter, and the mother was not a married lady? A. ME NOT A MARRIED LADY—SPEAKING TO AN UNMARRIED DAUGHTER.

348 x-Q. WAS IT A LEGITIMATE SUBJECT TO SPEAK ABOUT? A. FATHER WAS VERY QUIET ABOUT SUBJECTS LIKE THAT BEFORE ME.

349 x-Q. Did your father hesitate to speak of family subjects before you? A. Oh, not at all.

350 x-Q. *Why was the subject of Moore's child, or daughter, a delicate subject to speak to you about?* A. *Nothing more than that he felt Moore hadn't done his duty, you know.*

353 x-Q. Why was it a delicate subject to speak to you about? A. NOTHING MORE THAN ONLY THAT I WAS NOT A MARRIED LADY, he didn't say much about it. First off he talked a good deal about it.

354 x-Q. First off he talked to you a great deal about what? A. About Moore's married life and his having———

355 x-Q. Having a daughter? A. Didn't know what the issue was then.

356 x-Q. But about the time of Moore's death? A. I say at the time of Moore's funeral he spoke of Moore's daughter.

358 x-Q. And why do you mean it was a delicate subject to talk to you about Moore's daughter? A. Moore wasn't then living as he ought to live, at that time.

363 x-Q. Was not living as he ought at the time; how was he living at the time; was he living with other women at the time? A. Yes, sir; he was, he was living in a house in Seventeenth street, in a regular harem, if I must speak plain.

367 x-Q. You said you thought it was a delicate subject to talk about his daughter? A. During the latter period of Moore's life.

368 x-Q. Your father thought it was? A. He didn't say anything to me about it.

372 x-Q. I am asking you about the conversations to which you have testified; wasn't that the reason why it was considered a delicate subject to talk to you about—because the mother was not married? A. *I can't tell you; I didn't know much about it at that time.*

373 x-Q. You can't tell about that; is that what you say? A. *Well, I have forgotten the circumstances*

375 x-Q. You can't recall exactly whether that was the reason or not? A. I can't recall all the circumstances.

376 x-Q. You can't recall whether that

was the reason why it was a delicate subject or not; is that what you say? A. I can't tell father's reason

377 x-Q. You can't tell your father's reason; you don't know whether that was the reason or not, why it was a delicate subject to talk to you about; is that what you say? Won't you please answer the question, Miss Storms? A. I knew there was always a child.

378 x-Q. But you didn't know whether it was a natural or illegitimate child or not; is that it? A. *I didn't know the particular circumstances.*

379 x-Q. You didn't know the particular circumstances, and you always knew it was a delicate subject to speak about? A. *To me.*

380 x-Q. *To you because you were an unmarried lady?* A. *Yes.*

381 x-Q. Wasn't the reason why it was a delicate subject, because the child was illegitimate? A. He never said anything to me about that.

382 x-Q. And you didn't know whether that was the reason or not? A. I did not. I merely knew how father felt about a thing of that kind.

384 x-Q. He felt it was a delicate subject, did he? A. I suppose so.

385 x-Q. I will read you this affidavit if you will listen to me:

'The petition of Henry Storms respectfully shows, that your petitioner is a resident of Tarrytown, Westchester Co., in the State of New York, and is a creditor of said B. M. Chesebrough, deceased, and is of full age, that the said deceased departed this life at the City of New York, on the day of April, 1866, without leaving any last will and testament, to the best of your petitioner's knowledge, information and belief. That your petitioner has made diligent search and inquiry for a will of said deceased, and has not found any, or obtained any information that he left any; that said deceased died possessed of certain personal property in the County and State of New York, and that the value of all the personal property, wherever situated, of which the deceased died possessed, does not

exceed the sum of ten thousand dollars. And your petitioner has been informed and verily believes that said deceased left surviving Charles A. Chesebrough, a brother of full age, residing at 211 East Eighteenth street, N. Y. City, his only next of kin; that said deceased was unmarried, and was at or immediately previous to his death an inhabitant of the County of New York, and left no father or mother surviving.'

Do you notice that this affidavit stated that Charles A. Chesebrough was the only next of kin of said Blazius M. Chesebrough, and that he was unmarried. Do you think your father knew Blazius M. Chesebrough was married or unmarried?

A. I couldn't tell.

386 x-Q. YOU COULDN'T TELL WHETHER HE WAS MARRIED OR NOT? A. NO. I COULD NOT TELL.

387 x-Q. Do you think your father had any more information in 1868, at the date of this affidavit, than he did at the time Blazius M. Chesebrough died? A. There was something said at Mrs. Chesebrough's death about the subject—at his mother's death.

389 x-Q. About his relations with this woman? A. Yes; must have been something said.

390 x-Q. You think there must have been something said at his mother's death? A. Yes.

391 x Q. Will you please look at that affidavit, and do you notice that it is partly printed and partly written; will you read the third line from the bottom of that affidavit; read it aloud to the examiner, if you please —the first line after the long blank space in the affidavit? A. 'Immediately previous to his death an inhabitant of the County of New York.'

392 x-Q. Immediately before that? A. 'Only next of kin.'

393 x Q. And the next sentence? A. 'Said deceased was unmarried.'

394 x-Q. You notice the 'unmarried' is written, and the rest is printed, do you not? A. Yes, sir.

395 x-Q. Now what explanation have you

to give, if any, in relation to your father's affidavit, that Blazius M. Chesebrough was unmarried? A. *Father must have been aware of it at that time, I think. It is something I don't understand. I knew father knew there was a child, and he may have spoken of it.*

396 x-Q. You knew your father knew there was a child, and your answer is he must have been aware the child was born out of wedlock? A. I DON'T KNOW; I DON'T UNDERSTAND.

398 x-Q. You say you have forgotten? A. Why, so long ago.

399 x-Q. You have forgotten things that happened in 1866 and 1868, more than you have the things that happened in 1854, 1855, 1856 and 1857? A. Of course Moore's death was more recent to me.

400 x Q. And you would be more likely to remember a more recent event than one further off, wouldn't you? A. Some events I may remember more than others.

401 x-Q. Is there any reason why you remember an event that happened in 1854 or 1855, or thereabouts, any better than an event that happened in 1866, 1867 or 1868? A. Some particular events I can recall.

402 x Q. What events are you the most likely to recollect? A. My own life, of course had some events.

403 x-Q. You recollect distinctly the fact of your father taking proceedings to realize upon a claim against Blazius M. Chesebrough's estate, do you not? A. I recollect that.

404 x Q. But you don't recollect why it is that it was considered a delicate subject to talk to you about the fact of Moore's having a daughter? A. HE KNEW HOW THOSE BOYS WERE LIVING.

405 x-Q. How do you mean he knew how they were living; how were they living? A. *Why they were living a very fast life.*

407 x-Q. You mean that Moore was living with a woman who was not his wife? A. The latter part of his life. Moore did not live the latter part of his life with the woman he called his wife.

408 x-Q. He was living with another woman? A. It wasn't one woman.

409 x-Q. He was living with a number of women the latter part of his life who were not his wives; but the earlier part of his life you don't know whether the women he lived with were his wives or not? A. My father must have known.

410 x-Q. You say your father must have known whether the woman he lived with and was the mother of his daughter, was his wife or not? A Father spoke of Josephine.

411 x-Q He always spoke of Josephine, and you said that he must have known whether she was his wife or not? A. At the time.

412 x-Q. He must have known at the time? A. I can't say.

413 x-Q. And if your father has sworn that Blazius Moore Chesebrough was unmarried, you think he must have known, do you say? A. Perhaps not the latter years of his life; I don't know.

414 x-Q. You don't know? A My father; I didn't know that was ever signed by father.

415 x-Q. If you had known that your father had sworn in a judicial proceeding that Moore was unmarried and that Charles A. Chesebrough, his brother, was his only next of kin——? A. Well, I can't; its father's signature.

416 x-Q. You know it is your father's signature? A. Yes, sir.

418 x-Q. Do you think your father would have sworn to what was false? A. I hardly think so.

419 x-Q. You don't think he would have sworn to what was false at the time? A. I don't think he would ever.

420 x Q. You testified yesterday that your father was very intimate with Blazius Moore Chesebrough during all his life? A. Yes, sir.

421 x-Q. And more intimate than anybody else? A. I think so.

422 x-Q. He was more likely to know whether Moore was married than any other man, was he not? A. As far as I know;

Uncle Geisenheimer may have known; they were very intimate with Mrs. Chesebrough.

425 x-Q. Aside from your Uncle Geisenheimer, you think your father was the more likely to know more about Moore's relations to the woman he was living with than any other man? A. I think he might have."

And so it goes on. The witness evidently thought that she could pervert the facts, so as to do the complainants some good, and Mr. Chesebrough —whom her family evidently have some deep grudge against—some injury in this case; but when confronted with this petition and affidavit of her father. she sees that the game is up, and tries to make the best of it.

It is one of the inconveniences of this mode of trial that it is impossible to picture on paper exactly what occurs during the taking of testimony. We should like nothing better than to have photographed for the Court the scene when Eliza Storms was compelled to admit that her father declined to talk with her on the subject of Moore's relationship with this woman, because it was such a "delicate subject," and that she, being an unmarried woman, could not be told the secret of Leonora's illegitimate birth, and that her father must have been aware at the time that Blazius M. Chesebrough was unmarried, and did not like to speak of it to her. I have never witnessed a like scene.

And so collapsed, all at once, the theory upon which the complainants depended so much, that General Henry Storms, the intimate friend of the Chesebrough family, the closest confidant and associate of Blazius, the man who of all men knew the true relationship between Blazius and Josephine, knew or believed that there was a marriage, and so we get upon the record the most solemn and emphatic declaration of this relative and confidant of the family, this intimate friend and associate of Blazius, that there was no marriage, and that Blaz-

ius died as he lived, unmarried, and without lawful issue.

If any one desires to reconcile the testimony of these witnesses with honesty, we are willing they should try, although the difficulties in the way of such a theory are so great that *we* do not care to make the attempt, but nevertheless as to some parts of it it *may be* possible to do so. It is very likely and natural that General Storms should have thought that the question of this relationship was a "delicate subject" to talk about to his children, and it is possible that he may have allowed them to be deceived, or even have intentionally deceived them in the matter.

But that he was deceived himself was inconceivable, and that he deliberately lied in this application for letters of administration, with no purpose in view, and nothing to be gained by it, cannot for a moment be believed, and we are inevitably driven to the conclusion that General Storms correctly stated the facts in his petition and affidavit when he says that Blazius M. Chesebrough was "unmarried," and left his brother, Charles A. Chesebrough, as his "only heir and next of kin."

XXIII.

The Unexecuted Will.

We have not done with the Storms family yet.

Mrs. Fitzgerald, in her desire to do her best for the complainants, and to injure Mr. Charles A. Chesebrough as much as possible, mentions, somewhat mysteriously, in answer to the complainant's questions, a will which she said Blazius M. Chesebrough had in his last days caused to be drawn up for him to execute, and which was all ready for execution, and would have been executed, except that

he died before the act was finally accomplished, and we have some mysterious predictions about the disclosures which this unexecuted, but otherwise complete, will would make, if it could only be found and produced (Vol. II, fols. 2833 and following).

At folios 2833, 2834, Vol. II, occurs this, which, in the light of what transpired afterwards, must be considered as very far from an ingenuous statement

> "116 Q. If you heard conversations by your father, or had conversations with your father in regard to Moore's marriage, or anything pertaining to it, you may give it. A. I would always ask father when I would come home about Moore's health, after his mother's death, and father seeing him a great deal would be there twice a week; and when Moore found he was passing away *he was anxious to make a will;* and then my father said to him, 'Moore, you must, if you want to make a will, and bequeath this property to Mrs. Eliza Storms as my wife, you should take care of your own.' And he replied, 'General, they are taken care of'; he meant by his mother's will. This is the conversation I had with my father, and father says, 'Well, then, if that is so, Moore, that is all right. I want this child and the mother taken care of.' He said they were provided for by his mother's will, and it wasn't very long after that he died.
>
> 117 Q. Do you know what was done, if anything, in regard to any will of the character that you spoke of? A. The will that Moore wanted to make?
>
> 118 Q. Yes. A. Why, he never cared for Charles to have a cent of the property that came to him from Uncle Moore. He wanted it to come back to the family—that is, to my mother. He wanted her to have it. She bore the name of Eliza Moore; and he made out a will to that effect, but it wasn't signed. He wanted my mother and my sister to have the silver that bore the name of the Moore family; but the will he did not sign. And the will is not signed, and the silver, of course, my sister has that.

119 Q. He never did sign the will? A. Never did. *He passed away in the interval before father went there with his lawyer.*"

Here is a plain and direct statement that upon his deathbed Blazius M. Chesebrough (he is commonly spoken of by members of the family as Moore) consulted with his intimate friend and confidant, General Henry Storms, about the disposition which should be made of his property for the benefit of his wife and child, and about making a will with that end in view, and that such a will was prepared at Blazius M. Chesebrough's direction, and it was only because he died too soon that it was not actually executed.

We have found this will, and we shall come to it very soon and see how near the truth Mrs. Fitzgerald gets.

Eliza M. Storms, in her first deposition in Brooklyn, testifies to the same effect in relation to this will. She has evidently seen the testimony of her sister, and follows it (Vol. III, fols. 2925–2932).

"40 Q. Was there ever any conversation between your father and yourself about Moore making a will; and if so, what was it?"

(It is to be borne in mind that these questions were put by the complainant's counsel to his own witness, so that if there could be any objection to the testimony given as being incompetent, they have waived it by asking the question.)

" A. Yes, sir; that he wanted father to have the Fort Washington property.

41 Q. Well, what did your father say to him, if he told that to you? A. That he should make it so.

42 Q. How long was this before he died? A. Oh, not six months before he died.

43 Q. A very short time before he died? A. Just before he died – just before mother died.

48 Q. Do you know what was done about making that will, if anything? A. We

have, I think, a copy of the will. I have the will; only it wasn't signed by the lawyer, Byrnes. That must have been signed just before Moore died.

49 Q. You say it wasn't signed by the lawyer; what do you mean by that—do you mean that the will hadn't been what is termed executed? A. Not fully executed.

51 Q. What was the reason for Moore's not signing the will? A. He thought his mother's will was sufficient.

54 Q. Was there any other reason given for his not signing that will? A. He thought he was going to live longer, and he had sent for his lawyer, and he died in the meantime.

55 Q. Do you know what his lawyer's name was? A. Byrnes. I think there were two brothers.

57 Q. Did you have a conversation with your father about anything else connected with Moore—what Moore said to your father, and what your father said? A. Well, that he wanted to provide for his family.

58 Q. Did he say who his family were—who they consisted of? A. *His wife.*

59 Q. Did he say anything else? A. That she was a very beautiful girl.

60 Q. And what did he say as to whether he had a child? A. He didn't say anything about that."

Here is another plain attempt of this witness, following in the footsteps of Mrs. Fitzgerald, whose testimony, taken some time previously, she had before her, to make it appear that Blazius M. Chesebrough, in his last moments, recognized the existence of a wife and child, and executed a will for the purpose of providing for them. On her cross-examination we subpœnaed her to produce the will or the copy of it which she had, but she did not do so, and we could not get it. We went into the subject with such minuteness as we could in the absence of the will, but the witness evidently suspected something, and we labored in vain, and after she was demoralized by the production of her father's affidavit that there was no wife or child, and com-

pelled to swear that the subject of the relationship between Blazius and Josephine was so "delicate" that her father could not talk with her about it, and that the reason of his reticence was that the relationship was illicit, and the child illegitimate, she was very chary of any subject which we introduced, and was not willing to be very clear about anything.

But we continued our search, and Providence being with us, we finally succeeded in getting hold of a copy of this will in the handwriting of this very witness, Eliza M. Storms, and by order of the Court we were allowed to recall her for further cross-examination upon the subject.

Such further cross-examination is found in Vol. VII, fols. 929–975, and in the light of what had heretofore been testified to, it is *very* interesting reading. The copy of the will which we produced to her is found among our exhibits (Vol. IX, fols. 760–767).

Miss Storms being confronted with this, testifies that the endorsement on the outside of it is in the handwriting of her father, General Henry Storms, and the rest of it, with the exception of this indorsement, is in her own handwriting, and that this copy was made by her in accordance with her father's direction, and that this is the will, or the copy, which she and Mrs. Fitzgerald referred to in their former testimony.

Here again we find another guide post which truth has set up for us in order that we may discover falsehood. It was easy enough for them to testify to what was said and done, when no writing could be found to contradict them, and to give their testimony in such a way that the inference should be favorable to the complainants, but the minute we find this actual piece of paper, with the writing on it, the illusion is dispelled, and everything is changed.

This will, as Mrs. Fitzgerald and Miss Storms testified, is generally in favor of the Storms family.

But instead of supporting the inference that there was a wife and child, it entirely negatives any such inferance. No wife or child is mentioned; on the contrary, there is contained this recital (Vol. IX, fols. 764-5):

> "My brother, Charles A. Chesebrough, is amply provided for, and on my death will receive the share given to trustees for my use by the will of my deceased mother. I have, therefore, not from any want of feelings of affection toward him, but solely for the above reason, not added to his property by this my will."

Mr. Charles A. Chesebrough could not receive the share given to trustees for the use of Blazius M. Chesebrough by the will of his deceased mother, except in the absence of lawful issue of Blazius M. Chesebrough, and this will is, therefore, the plain, clear and undisputed declaration that he has no lawful issue.

In the truth of this declaration we can place implicit confidence. If he had left a wife and legitimate child, it is utterly inconceivable that he would have allowed this statement to be inserted in the will which he intended to execute, or that his friend, General Storms, would have allowed it to be done for him, or that his confidential friend and attorney, Mr. Byrnes, who drew the will, would ever have put it there.

We have, then, this man, in the most solemn moment of his life, knowing that he is soon to meet his Creator, making the most solemn declaration possible that he has no wife and child; and we have the further fact that these Storms witnesses have been trying to palm off on us a story that this declaration, made under these circumstances, was directly to the contrary effect. The inference is irresistible either that these witnesses have been deliberately lying, or that they have been swearing so wildly and recklessly that their testi-

mony is not, under any circumstances, to be credited.

The testimony of Blaise Ryer, found in Vol. VI, fols. 99 to 126, should be read in this connection.

Blaise Ryer was a cousin of Blazius M. Chesebrough (their mothers being sisters), and has always resided at Fort Washington, scarcely a stone's throw distant from the old Chesebrough mansion, in which Blazius M. Chesebrough died. He was present at some of those interviews between Blazius M. Chesebrough and General Storms in relation to the preparation and the execution of this will. Blaize Ryer is a man of the highest character and standing, absolutely unimpeachable as a witness, and his testimony very clearly corroborates our theory of the case, and totally negatives the story of these Storms family witnesses in every possible way.

XXIV.

The special fictions of Mrs. Fitzgerald.

We have been dealing *generally* with the three witnesses which the Storms family has furnished us. We have now something to say *specially* about the evidence of Mrs. Fitzgerald and Christian S. Storms.

Mrs. Fitzgerald has testified (Vol. II, fols. 2826, 2827 and 2899-2903), that Mr. Charles A. Chesebrough was not married to the person we know as his first wife, but that he bore an illicit relationship to her, and lived with her meretriciously; in other words, that she was his concubine and not his wife, and that Mrs. Margaret Chesebrough was aware of this unlawful relationship, and poured her troubles about it into Mrs. Fitzgerald's willing ear.

This is shown to be a lie made up out of whole cloth, for which there is no excuse whatever. The marriage certificate between Mr. Charles A. Chesebrough and his first wife is in evidence (Complainant's Exhibit G 10, Marriage Certificate) introduced by the complainants, and shows that they were married in 1844.

We have also Mr. Charles A. Chesebrough's testimony as to that marriage, brought out also by the complainants on their cross-examination of him (Vol. VII, fols. 1077–1084), showing that there was no basis or foundation whatever for Mrs. Fitzgerald's spiteful lie.

Mrs. Fitzgerald also testified that the relations between Mrs. Margaret Chesebrough and Mr. Charles A. Chesebrough's first wife were unfriendly; such relations as might be expected to exist between a mother and a son's concubine, and such as would not be expected to exist between a mother and a son's wife.

This is proved, not only by the evidence of Mr. Chesebrough himself, and of numerous other witnesses well acquainted with the facts, to be also a baseless lie. Mrs. Fitzgerald is contradicted on this point by the positive, emphatic and unanimous testimony of Mary Roose (Vol. VI, fols. 306–324); of Mrs. Catherine Speight (Vol. VII, fols. 750–765); of Blaise Ryer (Vol. VI, fols. 123, 124); of Mrs. Maria Hegeman (Vol. VI, fols. 146–147); of Miss Amelia R. Moore (Vol. VI, fols. 166, 167); of Frederick W. Geisenheimer (Vol. VI, fols. 958–1001); and by the whole trend and current of the evidence in the case.

The relations of the younger and the elder Mrs. Chesebrough to one another are clearly shown by all the evidence in the case to have been of the most cordial, friendly and intimate character, and the mean and contemptible lie of Mrs. Fitzgerald in relation to this matter appears to have been without the shadow of a foundation.

XXV.

Mrs. Fitzgerald's story that Mrs. Margaret Chesebrough talked of Blazius as if he were married, and recognized Josephine as his wife.

The evidence of Josephine given as the complainant's witness (Vol. III, fols. 4158–8194) pretty effectually sets this at rest. But if anything more is needed we have not only Mr Charles A. Chesebrough's testimony (Vol. II, fols. 2773 to 2796 and Vol. VII, fols. 1000–1113), but the testimony of Mrs. Maria Hegeman, Miss Amelia R. Moore, Mary Roose, Martin Brill, Mrs. Catherine Speight, Blaise Ryer, Mrs. Mary E. Haley, Mr. F. W. Geisenheimer and others all heretofore referred to, to show as clearly as anything can be shown that Mrs Chesebrough always regarded her son Blazius as an unmarried man, frequently expressing her desire that he would marry, and that she never recognized or spoke of the existence of a wife or child; and besides that, we have the evidence of her will, which most certainly would have mentioned a wife and child if there had been such, and she had known it. There is nothing in the evidence to indicate that Mrs. Chesebrough was given to lying or accustomed to practice deception upon people, but she must have prevaricated in a way to make the most accomplished liar blush, if she had any knowledge, belief, or suspicion of the existence of a wife or child of Blazius.

The inference certainly seems unavoidable that it was *not* Mrs. Chesebrough, or those other numerous witnesses, but that it *was* Mrs. Fitzgerald who was lying, and that the lie was wholly without basis or excuse.

XXVI.

The evidence of Mrs. Fitzgerald as to Mr. Charles A. Chesebrough's abuse of his mother.

If Mrs. Fitzgerald *is* to be believed, Mr. Charles A. Chesebrough was one of the most inhuman and wicked sons that ever lived. The evidence shows that she is *not* to be believed, and that this is another malicious and spiteful falsehood.

Mr. Chesebrough's story of his life, brought out by the complainants on their cross-examination (Vol. VII, fols. 1049–1113) shows it to be such; and no one who reads Mr. Chesebrough's testimony in this particular will fail to be convinced of its truthfulness. He has been confirmed in his testimony by the evidence of all the other relatives and friends of the family whom we have called and by all the circumstances of the case. He was the youngest and favorite son, and his mother loved him and he loved his mother, as mother and son should love one another. They visited one another frequently and always lived on the most cordial and familiar terms. Nothing except the deep malignity and distorted imagination of Mrs. Fitzgerald could invent such an atrocious falsehood as she testified to upon this subject.

XXVII.

The apparent deliberate perjury of Mrs. Fitzgerald.

I do not see how it is possible to explain Mrs. Fitzgerald's statements on any other theory than that she committed deliberate perjury, and I do not propose to attempt it.

The only possible basis for her testimony is in the supposition that she has substituted Blazius for Charles and Charles for Blazius. The evidence shows that Blazius did sometimes abuse his mother. Charles did not; on the contrary, he was a most dutiful, loving and affectionate son.

If Mrs. Margaret Chesebrough ever heard of Josephine, and it is not at all probable that she did, she undoubtedly did hear of her as a concubine rather than as a wife of Blazius. She could not regard Mr. Charles A. Chesebrough's first wife other than as a lawfully wedded and honorable wife.

The testimony of the three members of the Storms family, particularly that of Mrs. Fitzgerald, shows a deep and bitter malevolence on their part towards Mr. Charles A. Chesebrough, and this is undoubtedly what inspires their testimony. It is possible, I do not say probable, that Mrs. Fitzgerald may have confused in her own mind the lives of the two boys; so that she was honestly attributing to the one the character which belonged to the other.

It is possible that her intense and malignant desire to do something to help the complainants and hurt Mr. Chesebrough may have distorted her memory on this subject.

It is possible that she made the attempt to quiet her conscience with the thought that what she was saying of the one was substanially true of the other, that it all belonged to the same family, so that it did not make much difference.

But it is not for me to act as her apologist. I can only say that all the facts and all the evidence in the case show that her testimony is utterly unreliable and untrue. If any one can explain it otherwise than by calling it a deliberate lie I have no objections. But I do not care to assume the burden of the explanation.

XXVIII.

Mr. Christian S. Storms.

The testimony of this gentleman has oeen considered in connection with that of his two sisters in the previous points. The three witnesses are so associated that, for most purposes, we can best consider them together. They all refer to their father, Gen. Henry Storms, as the very intimate friend of Blazius M. Chesebrough, the man who knew all that there was to be known in relation to him, and from whom they got the burden of their knowledge; and we have already seen how Gen. Storms has put himself on record, under oath, before his death, on this question.

But Mr. Christian S. Storms might possibly feel neglected if I failed to say something personal about him, and in the abundance of material at my command there is certainly no reason for slighting him in any way.

The testimony of this witness is specially conspicuous by his constant, prompt and prudent refusals to answer our questions, which seemed to trouble him. In this respect he must share the palm with Mrs. Sisson.

He is very touchy about his own life at the present time, and refuses to answer all questions upon that point (Vol. II, fols. 1744 to 1746).

He is equally prudent in reference to the date when, and the circumstances under which, he retired from the saddlery business sometime early in the fifties, the date and circumstances of which became quite important, as we shall soon see, in view of some features of his testimony. He refuses to answer *all* questions relating to that matter.

He contradicts himself frequently, evidently answering the questions according to the exigencies of the moment, and not being able to remember at one stage of his testimony what he testified at an-

other. He says at one place (Vol. II, fols. 1809–1812) that he knew Josephine Cregier well; met her frequently at the dancing academy and danced with her. At another (Vol. II, fols. 1657–1660) that he never spoke with her in his life, and doubts very much whether he would know her if he saw her.

His bias against Mr. Charles A. Chesebrough is quite clear, though perhaps less conspicuously displayed than that of Mrs. Fitzgerald. We can apparently rely always upon the proposition that any member of the Storms family will do anything they can, at any time, to satisfy their vengeance or vent their spite on this defendant for some fancied grievance that they have against him.

His story in many particulars shows the internal evidence that it is either wilfully or carelessly incorrect. The witness was absent from New York and knew nothing of what was going on here between 1856 and 1861 (Vol. II, fols. 1651–4). He testifies (fols. 1656–8) that he saw Josephine frequently at the theatre after he got back from the West, and yet the uncontradicted and undisputed evidence in the case shows that Josephine had left New York more than two years before this time and did not return for at least eight years thereafter. At the time when Storms sees Josephine and Chesebrough together at the theatre in New York, the civil war is raging and she is on the southern side of the line.

The witness has been carefully trained and instructed to call the woman Mrs. Chesebrough, and yet in the heat of the examination he repeatedly forgets himself and calls her Josephine Cregier, and quotes Blazius as speaking of her by that name, although he is testifying in relation to dates which are long posterior to the alleged marriage. Instances of this will be found all through the testimony. (See particularly Vol. II, fols. 1656–1659.)

The witness's whole testimony in relation to Josephine leads us to believe that he knew more upon that subject than he cared to tell, and more

than he thought it would be for the benefit of the complainants, whose interests he has so deeply at heart, that he should tell. The witness was a young man about-town at the time that Josephine was a young woman about-town, and the tenderness which he shows upon certain points is quite suggestive.

The thing which this witness specially contributes to this case is the side-saddle story (Vol. II, fols. 1567 to 1569).

He says that he kept a saddlery store at the corner of Cliff and Fulton streets, New York, commencing in the year 1850, and continuing for several years. (We tried very hard to find out how long it continued, but met with no success), and that sometime during the continuance of this saddlery business, his cousin, Blazius M. Chesebrough, bought a side-saddle from him, and made the remark at the time that "he had got a wife who could ride a horse as well as anybody" (Vol. II, fol. 1568).

There is not the slightest evidence or reason to suppose that this "wife who could ride a horse as well as anybody" was Josephine. It does not appear in the evidence that Josephine was ever on a horse during her lifetime, or had any equestrian talents whatever; and if this had been one of her accomplishments, we should undoubtedly have heard something of it. If he ever bought the side-saddle at all, it was much more likely to be for one of those numerous other women of his, of whom he boasted to Blaise Ryer (Vol. VI, fol. 109) "that they would stretch from New York to Albany if laid head to head," than that it was for Josephine.

There is, indeed, every reason to believe that it was before Josephine's time that this side-saddle episode occurred, if it ever occurred at all. The witness is *exceedingly* chary about the date when he went out of this saddlery business (Vol. II, fols. 1593 to 1737), and as to the way in which the busi-

ness was closed up, as well as to all matters connected with this little piece of evidence. But we do manage to get hold of the fact, that judgments began to pile up against him in 1853, and that in the New York City Directory for 1853 and 1854, which was compiled in May, 1853, he is described as follows (Vol. II, fols. 1726 to 1731): "Storms, C. Schaeffer, *late* saddler, 53 Fulton, h. 188 Atlantic, Brooklyn," which plainly indicates that he had left the saddlery business some time *before* May, 1853, and there is just as much reason from the witness's testimony for believing that the side-saddle was sold in 1850 as at any later period.

It is the present theory of the other side that Mr. Chesebrough did not meet Josephine until 1854, and no marriage is claimed until the latter part of that year. It seems very clear that the side-saddle could not have been intended for her.

But, suppose it had been intended for her—what then? If a man was buying a side-saddle for a *mistress*, particularly from a relative or acquaintance, he would very naturally be self-conscious and think some explanation was necessary, and would blunder out some such remark as this about having a wife who could ride as well as anybody. If he was *really* buying it for a *wife*, he would be likely to say nothing. The whole occurrence accords quite as well with the theory of an illicit relationship as with any other.

The witness says that he sometimes made inquiries of Blazius about his wife, and that Blazius, in some sort, answered the questions; but the inquiries and the answers are both of such a nature as to lead us to suspect that, if any such conversations really occurred, they both regarded the wife part of it as quite as much of a joke, and a joke of the same sort as that which was bandied between Chesebrough and Peter Staeden, of which I speak in another part of this brief, and that it was the way one man-about-town had of speaking to another man-about-town of his mistress. He says (Vol. II, fol. 1564):

"I asked him one time, says I, 'Well, you have been getting married.' *He was not very communicative always and he wanted to know what I wanted to know for, and he wanted to know where I heard it.* I told him I heard it at home; that I heard *my father* and mother speak of it (the witness's father was Gen. Henry Storms, and his sworn opinion on the question of Blazius M. Chesebrough's marriage is a matter of public record).

> "Q. Well, what did he say? A. He said *he was old enough to get married.*
> Q. What else, if anything, did he say? A. He *admitted to me* that he was married."

When men have been really married, and have brought to their homes a wife whom they love and of whom they are proud, they do not have to be cross-examined in order to induce them to "admit" that it is really a wife and not a mistress that they are associating with.

The witness says in another place (Vol. II, fol. 1571): "I used to ask him how his wife was, and he always answered 'well' or something of that kind. *He never was much of a hand to communicate much one way or the other—rather reticent than otherwise.*"

Men are apt to be reticent when speaking of their mistresses, and men who keep mistresses are "never much of a hand to communicate much one way or the other" about them. But when one cousin is inquiring of another of the health of a real *wife* we can see no motive for reticence or for hesitation in answering the courteous inquiries.

It is not the lawful relationship with the woman honored with the dignity of wifehood, that men try to conceal; but it is the unlawful connection with women who are not their wives that they are "reticent" about.

It does not appear that previous to the side-saddle incident Mr. Storms had any intimation that

Chesebrough was married. It is clear from the testimony that he intends us to understand that this was the first time he had heard of it. He asks Chesebrough in surprise when he orders the side-saddle (Vol. II, fol. 1569), "What are you going to do with that, Moore?" and it is in answer to that question that Chesebrough makes the confession, "I have got a wife."

What then follows is very suggestive.

> "50 Q. Did he say what his wife's given name was then? A. No, I don't know that he did, at that time.
>
> 51 Q. Was there *anything else* said, than what you have already stated, at that interview? A. I think not—not that I can remember."

Words are not the only instruments by which we communicate thoughts to our fellow men. The tone, the gesture, the expression, the slightest muscular movement, is often quite as indicative as the spoken word, and nothing is more misleading than to take the cold language from its hot and suggestive environment and set it up as the whole story. What Blazius intended his cousin to understand, and what that cousin did understand can be judged quite as much by what he omits as by what he says (if the interview ever really took place). If it had been the frank communication by one young cousin to another that he had become a Benedict, and had a loving and beautiful wife as the partner of his future joys, there would have been congratulations, inquiries without number, messages, all the things which usually take place under such circumstances. If the communication was accompanied by a wink of the eye or that peculiar tone of voice which men sometimes use when they do not wish or expect to be believed, Mr. Storms was astute enough and enough of a gentleman to do just what he did do—make no impertinent inquiries and let the matter drop.

The witness further testifies (Vol. II, fol. 1576):

> "65 Q. Do you recollect whether he (Blazius), ever took his wife to your father's house? A. *I do not remember that.*
>
> 66 Q. You never saw him there with her? A. Not that I remember, not that I know of."

(Fol. 1 73).

> "60 Q. Did you ever see she and him (Josephine and Blazius) together? A. I have seen a lady with him at the theatre and on the street, *said to be Mrs. Chesebrough.*
>
> 61 Q. Who gave you the information that it was Mrs. Chesebrough that you saw with him at the theatre and on the street? A. That I can't just remember who told me.
>
> 62. Q. Did he ever tell you that this was the lady that was his wife, that he had with him? Did Blazius ever give you the information that that lady that he had with him was his wife? A. *I don't know as I ever questioned him about it at that time. I saw more of Moore Chesebrough after '61 than I did prior.*
>
> 65 Q. Do you recollect whether he ever took his wife to your father's house? A. I do not remember that.
>
> 66 Q. You never saw him there with her? A. Not that I remember, not that I know of."

He meets his cousin with this women whom he is now trying to make us believe was his cousin's wife; he never seeks or gets an introduction; and his only information that the woman really is his cousin's wife is that she is "said to be Mrs. Chesebrough," but he can't remember who told him. Intimate as Blazius was with Gen. Storms and all his family, he is not known ever to have taken this woman, who is called his wife, to the house of his dearest friends.

Is it not apparent enough that Mr. Storms knew, as well as his father knew, that Blazius M. Chesebrough "was unmarried"?

(Fol. 1576.)

"68 Q. Did you ever have a conversation with Margaret Chesebrough about the marriage of Blazius Moore, and if so, what was it? A. I said to her, at one time, says I, 'Auntie, Moore is married, is he?' She says, 'They say so.' Says I, 'Do you know it to be so?' She says, 'Only from what she heard.'"

The son himself has evidently never told the mother that he had a wife, and the cousin is certainly very much in doubt about it.

(Fols. 1580-1.)

"77 Q. Were these things (Blazius's relations with women) talked over when you would be at Margaret Chesebrough's house? A. We were boys, young men. We would hear the conversation, of course.

78 Q. Were they talked about? A. They were talked about.

79 Q. Your Aunt Margaret would talk with whom? A. Mother and father.

80 Q. And also with you? A. *No. Not particularly with me.* But we could hear the conversation *going on.*"

If the witness's father and Mrs. Chesebrough were, in these conversations from which the witness was excluded, talking about Josephine in connection with Blazius, they were probably speaking bluntly and frankly, for we *know* that General Storms understood and stated under oath that Blazius "was unmarried," and as for Mrs. Chesebrough, her whole life and conduct shows that she never believed that Blazius had a wife.

On the whole, this witness's testimony, even if it be considered credible (and it is of at least doubtful credibility) properly interpreted, is much stronger evidence in favor of an illicit than of a matrimonial relationship between these two people. It is evident that to get at the truth from Mr. Storms we must read "between the lines," weigh his acts as

well as his words, study the environment as much as the language, and try to find what the witness is endeavoring to suppress as well as that which he is so ready to say.

So read and so interpreted we see pictured, quite clearly, something which is very different from a marriage.

XXIX.

These three children of Gen. Henry Storms are thoroughly discredited.

1. By the spirit they exhibit.

They show, all through their testimony, on direct as well as cross-examination, their intense hatred and spite against Mr. Charles A. Chesebrough, and an irrepressible desire to do everything they can to injure him and help his enemies.

2. By the oath of their father, on his application for letters of administration—a public and formal record of what he knew to be the truth in this matter.

3. By the production of the will, about which they had at first so freely and glibly testified, on the supposition that we could not get hold of it and confront them with it, and which, when produced, shows that the whole story in relation to it was a lie.

4. By the proved perjury of Mrs. Fitzgerald.

5. By the admissions of the daughter Eliza, on the witness stand, after she was confronted with her father's affidavit, and with a copy of this will

in her own handwriting, with her father's endorsement.

6. By the testimony of Blaise Ryer.

7. By their transparent efforts to conceal and distort the truth, in order to help the complainants and injure Mr. Chesebrough.

8. By the transparent and disingenuous attempt of Christian S. Storms to turn what was evidently a passing joke about a mistress (if there was any basis at all for the testimony) into a solemn declaration of marriage.

9. By the repeated and unwarranted refusals of Christian S. Storms to answer pertinent and important questions, and by his utter and supreme contumacy.

10. By the many material and unexplained contradictions in the testimony of Christian S. Storms.

11. By the testimony of Mr. F. W. Geisenheimer, Mrs. Mary E. Haley, Miss Amelia R. Moore, Martin Brill, Oscar Hudson, Martha M. Bowers, Mary Roose, Jeremiah V. Spader, Mrs. Margaret V. Spader and others, all belonging to the Chesebrough family, or in some way closely connected with it, and all witnesses against whose knowledge, intelligence, integrity and credibility nothing whatever can be said.

XLIV.

Cohabitation, to be evidence of marriage, must be matrimonial cohabitation.

"The presumption of marriage only arises from matrimonial cohabitation. Where the

parties not only lived together as man and wife, but held themselves out to the world as sustaining that honorable relation to each other, *mere illict intercourse raises no presumption.*"

Brinckley *v.* Brinckley, 50 N. Y., 197.

"Living with the deceased, however long or in whatever manner, would not make her his wife. Marriage is the legal result of a mutual and absolute engagement between the parties to be husband and wife. Prescription or copulation, either singly or combined, can never constitute marriage."

Holmes *v.* Holmes, 1 Abb. U. S., 525.
Floyd *v.* Calvert, 53 Miss., 37.

Matrimonial cohabitation is constant. The husband is true to one wife and the wife is true to her one husband. I do not mean to say that no husbands are faithless to their wives and that no wives have ever gone astray, but I mean that only so far as the relationship is constant and as the parties are true to one another is it matrimonial, and evidence of inconstant relationship or association with many women or many men is not proof of marriage to one of them. Marriage may possibly exist in spite of inconstancy, but inconstancy is not proof of marriage.

In this case it would seem that there has never been any cohabitation which could be called matrimonial or constant.

We have evidence that leads us very strongly to suspect the regularity of Josephine's life even before her departure to the South to become the mistress of Jackson, and while she was maintaining some sort of connection with Blazius. Her own confession of the way in which her association with Mr. Chesebrough commenced (Vol. III, fol. 4159; Vol. VII, fols. 808 to 812) leads us to suspect that, notwithstanding her youth, this was not her first

lapse from virtue. Women who yield so readily fall early, and although she was young when she met Chesebrough, she was old enough to have had many escapades of the kind before this one. Then we have the positive testimony of Mr. Nichols, Mr. Bensel and Mr. Shears, which indicates very clearly that, while she was associating with Mr. Chesebrough, she also showered her favors upon other men (Vol. VI, fol. 1002–1011; Vol. VIII, fols. 218–299, 477–512).

It is fair to say that she denies this, and claims that she did not associate with other men until after she left Mr. Chesebrough. Her denial is natural, and it matters little to our case whether it is she or the witnesses who impeached her virtue who are telling the truth. If she is to be believed in this, then we must believe her positive statement, made at the same time, that there never was any marriage between her and Mr. Chesebrough. If she is testifying falsely, then their testimony, which contradicts hers, must be believed instead.

As to the want of virtue and fidelity on the part of Mr. Chesebrough, himself, the evidence is overwhelming.

Mr. Blaise Ryer (Vol. VI, fols. 109–110) gives us Mr. Chesebrough's confession: "The women I have had in tow, if you laid them head to head, they would reach to Albany." The same witness (fols. 122–123) tells us of Chesebrough's frequenting houses of ill fame on Mercer and Houston streets.

Arminius Aikin (Vol. VI, fols. 358–504) tells us something of Chesebrough's escapades.

Dr. Frederick A. Putnam (Vol. VI, fols. 538 to 744) prescribed for him for all sorts of venereal diseases, and James H. Bensel shows that he was afflicted with such diseases during the period of alleged matrimonial alliance (Vol. VIII, fols. 229 to 234).

Thomas W. Bollas (Vol. VI, fols. 638–639) tells us of his frequenting houses of ill fame.

Henry Hill, whose experience in that phase of the life of New York City is probably not exceeded by that of any other man who ever lived here, tells us (Vol. VI, fols. 745–769) a long and disgusting story of Chesebrough's connection with lewd women during the years 1856, 1857 and 1858, and thereabouts (the period during which he is said to have been the husband of Josephine).

John D. Clark (Vol. VI, fols. 823–825) tells about his association and connection with prostitutes.

Francis N. Drew (Vol. VI, fols. 907–957) gives similar testimony.

The testimony of John Judge and John Henry (Vol. VI, fols. 1115–1233) contains a very full and detailed account of Chesebrough's visits to houses of ill-fame during this alleged period of his marital felicity.

William T. Delaney, Alexander Vincent, William G. Peterson, Samuel Hemple, George W. Smith and Samuel E. Ryan (Vol. VII, fols. 1–295 and 423–430), give us a similar story, all showing that it was his habit to visit frequently houses of ill-fame and associate with lewd women during the time when he was supposed to be the happy and virtuous husband of Josephine.

James H. Bensel and Samuel Shears (Vol. VIII, fols. 217–513) give similar testimony.

It is not alone in our proofs that we find this evidence.

Eliza M. Storms (Vol. III, fol. 3088) says that he was living in a house in Seventeenth street "in a regular harem," and (fols. 3103–3104):

> "Q. He was living with another woman?
> A. It was not *one* woman."

And the manner of his life was more shocking than she, a maiden lady, cared to tell us about. The evidence all the way through on both sides shows that Blazius M. Cheesbrough's conduct was

more unhusband like than that of any husband whose life has ever been a matter of record.

It may be that Josephine was more favored than some of the others, and it may be that she was not, and that the only reason why she figures more prominently in this story than some other woman, or other women, is because we are more concerned in this case with her life than with the lives of the other women. But it appears very clear that she was not the *only* woman in the world to Mr. Chesebrough, as a wife is, or should be, and that she was only one of a multitude, any one of whom was as much a wife to him as any other.

It is not from conduct like this that we naturally and necessarily infer a previous marriage. Husbands are sometimes guilty of infidelities, but a life which is spent in the continued association of lewd women is not such a life as will lead the Court to *infer* a marriage in the absence of any direct evidence of the fact.

XLV.

The evidence taken altogether is much more consistent with an illicit than a matrimonial connection.

1. We have already shown, by abundant authority, that cohabitation, to be evidence of marriage, must be matrimonial and not illicit in its origin.

"If" (says the Court in Clayton *v.* Wardell) "it was subsequently changed, *at what time did it become lawful?*"

Mr. Chesebrough and Josephine are shown by the evidence to have cohabitated as man and wife as freely within two hours after they first met as

they ever did. They lived together as man and wife as much before there is any claim of marriage as they did at any time thereafter. They occupied the relation to one another of husband and wife, and performed the duties of such relationship as much, to all appearnces, at his lodgings in the Sirocco Dancing Academy building and in the Dey Street Hotel as they ever did after they returned from Baltimore. On this point Mr. Justice Lacombe says:

> "In 1854, when he first encountered Josephine Cregier, though some testimony would make it 1853, he was about thirty-five years of age and she was sixteen. They met at Sirocco's dancing rooms, in Bond street (Blazius having apartments in the same building), and that same night she shared his bed. Shortly thereafter she left her mother's home and lived with him, in Bond street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection." (Vol. IX, fols. 1264–5).

2. A marriage is ordinarily preceded by an engagement; concubinage is not. A wife is won slowly; a concubine surrenders at the first assault. It might be possible that a man and woman should marry at first sight, but it would not be natural; it would require direct and positive evidence to establish such a fact. It would not be presumed. If a man and a woman share one another's bed at their first meeting, it might possibly be by reason of a marriage, but the circumstances would not indicate it. The very strong presumption would be that it was something very different. The complainants appear to have appreciated this fact as fully as we do, and they have made frantic efforts to prove a prematrimonial engagement; but they have had hard luck.

They made simple Peter Staeden testify that Mr. Chesebrough brought some young girl into his

barber shop and introduced her to the barber, who was to shave him, as "Josie, his intended." I have already dealt with Peter Staeden, and I think have succeeded in showing that if any such occurrence ever did take place it was regarded by all parties as a huge joke.

They get Mrs. Franklin to testify, in a very loose manner, it is true, that she understood from the girl's mother that there was such a prematrimonial engagement, but if this story is not the result of a distorted memory or is not made up out of whole cloth, she was certainly deceived, for Josephine's uncontradicted testimony shows that the time which virtuous lovers spend in the sweet interchange of mutual vows, she and Chesebrough spent in an unholy and licentious embrace, and that instead of sharing one another's holiest and purest thoughts, as engaged people with a pure and happy life before them do, they, at once and apparently as if it was the thing to be expected, begun to share one another's bed, as libertines and harlots do. Mrs. Rachel Cregier, the mother of Josephine, on whose statements Mrs. Franklin depended for her information on the subject, was certainly aware of her daughter's irregularity, as was shown by her subsequent suit for seduction, and if she ever made such statements to Mrs. Franklin, she must have done it to deceive her, as a mother naturally might.

The theory of a prematrimonial engagement is negatived by all the evidence in the case.

3. The cohabitation which shows marriage is the cohabitation of the home. A man takes his wife to a home, a concubine or harlot to a hotel. For a wife, he selects some spot, however humble it may be, for a home, and around that "home" clusters the sweetest of human joys. For a concubine or a harlot he provides only a "place," where he may temporarily enjoy the sweets of her person. Blazius and Josephine never had *a home.*

When they were together, they went from hotel to hotel, and from place to place, never long in any one spot, never surrounding themselves with the accessories of a home, but simply seeking, as libertines and their concubines always do, some stopping place, where they could take in the coarse and voluptuous pleasures of the hour.

> "The cohabitation must be matrimonial in its character, as well as matrimonial in its inception, to be any evidence of marriage."
>
> Commonwealth *v.* Stump, 53 Pa., 132.

Such certainly was not the cohabitation of Chesebrough and Josephine.

4. The cohabitation, to be evidence of marriage, must be constant and regular.

> "An irregular cohabitation and partial reputation of marriage avail nothing in the proof of marriage. The irregularity in these elements of evidence is at once the reason to think that there is irregularity in the life itself the parties lead."
>
> Yardley Estate, 75 Pa., 207.

In our case, the evidence shows that whatever cohabitation there was between the parties was fitful, irregular and inconstant.

The evidence of Mr. James McPyke (Vol. VI, folio 1055) shows that from the latter part of 1854 up to the latter part of 1857 or the early part of 1858 he kept a gentleman's restaurant at No. 90 Prince street, near Broadway, and that Blazius M. Chesebrough was accustomed to take his one or two meals a day there, during the whole of that period and that he was always alone or at least had no woman with him. This restaurant was very near where Chesebrough was lodging most of the time, and a very natural and convenient place for him to get his meals.

When a man is living with a wife, in a home, he may spend the business hours of the day away from her in attending to his affairs, but when he eats, it is at his home or at least in company with his wife The happiness which a man derives from the society of a wife continues through the hours of the day as well as through the hours of the night; it is as much in the light as in the darkness. The pleasures which he gets from his concubine or his harlot are confined to the night season, and when the light comes, he leaves her.

If Mr. Chesebrough was living an irregular life with a mistress, it was very natural that he should get his meals at Mr. McPyke's restaurant If he was living a married life with a wife, it would be exceedingly unnatural.

The testimony of Mary Roose (Vol. VI, fols. 312 and 313, 329 to 332) shows that during all the period of his connection with Josephine, Mr. Chesebrough had his washing done at his mother's house, by this servant, and that it was a gentleman's washing only that was done for him.

If he was a bachelor, having lodgings outside, although at times living an irregular life with a concubine or a harlot, it was very natural that he should send his washing home to his mother's house to be done by his mother's servants, as he did. If he was a husband, living with his wife, they would naturally have had their washing done together, as husbands and wives usually do.

The testimony of Alexander Vincent (Vol. VII, fols. 49–113) shows that for a period of several weeks, during the summer of 1855 (when the alleged matrimonial relationship is supposed to have been at its height) Mr. Chesebrough was living alone in lodgings at the Smithsonian Hotel, and that Josephine was living at her mother's house on Sixth avenue, and only occasionally visited Mr. Chesebrough's rooms, and perhaps occasionally spent the night with him, as a harlot or concubine might.

The testimony of Mr. Samuel Shears (Vol. VIII, fols. 475–512) shows that he was keeping a hotel at Niagara Falls when Chesebrough and Josephine visited there on one of their illicit peregrinations, and it clearly indicates that they were not living together constantly, as husband and wife, but only temporarily and irregularly, as libertine and concubine, and that Mr. Shears, being a virtuous hotel keeper, indignantly upbraided them for turning his house into a brothel, and sent them away; and they left, not together, as husband and wife go, but separately, she to her home and he to his.

Truly, this is not the "legal idea of cohabitation," which, as the Court, in Commonwealth *v.* Stump, *supra*, says, is that "which carries with it a natural belief that it results from marriage only," and we may well say in this case, as the Court further said in that case, "the irregularity in these elements of evidence is at once the reason to think there is irregularity in the life which the parties led."

5. Pregnancy follows cohabitation quite as surely in cases of concubinage as in cases of marriage. Nature does not inquire into the character of the union.

But there is this difference.

In cases of concubinage pregnancy is a disgrace, and is concealed in every possible way. In case of marriage it is an honor, and no concealment is attempted.

Pregnancy seems to have followed this unholy union of Chesebrough and Josephine, but it was concealed so effectually that Mrs. Sisson, the sister, who claims to have been with them so much, and who saw Josephine just before she left for Saratoga to give birth to the child there, did not know of it (Vol. III, fols. 3623–4). Josephine's mother appears not to have known of it, for several years afterwards she commenced a suit against Mr. Chesebrough for seduction, and no mention or suggestion is made

of the first pregnancy which resulted in the birth of the Saratoga child, in 1855, but he is charged only with the responsibility for the birth of Leonora, in 1857. The charge is that "on or about the 9th day of January, 1857 (just nine months before the birth of Leonora), the said Josephine Cregier became pregnant and sick with child" (Vol. IX, fols. 25–76; Vol. VIII, fols. 1–215).

Peter Staeden testifies that he visited them at the Smithsonian Hotel within a *very* short time before the birth of this Saratoga child, and he notices no indication of pregnancy; describes Josephine as a girl of very slight and slender build, and sees no difference between her appearance then and her appearance a year and a half before (Vol. I, fols. 376–407). The people at the Smithsonian House, where they are said to have stopped just before they went to Saratoga, did not notice and were not aware of it (Vol. I, fol. 599). So far as we can learn from the evidence the fact of pregnancy was so carefully and effectually concealed that there was no human being in the world, outside of the two persons who co-operated in producing it, that had any suspicion of the fact.

It was not nature, but art, that must have effected this concealment. People naturally try very hard to conceal an unlawful pregnancy, and they sometimes succeed, as in this case. In case of a lawful pregnancy no such attempt is made, nor could it succeed if attempted.

In a settled and civilized community no wife ever gives birth to her first-born child without the fact of her previous pregnancy being known to a wide circle of friends, neighbors and acquaintances.

6. The birth of the first-born child of a marriage is always an event of great importance and rejoicing.

The relatives and friends of both parties gather around the bedside of the happy mother and pour

in their congratulations unceasingly upon the fortunate parents. All that art and love can do to lighten the pains of the mother and smooth the pathway into the world of the new born child is done.

The birth of any child of a holy marriage is an honor, and it is considered the greatest of blessings.

The birth of a child in concubinage is a disgrace, and it is considered a calamity.

If the child which is the fruit of marriage lives, the parents and all the friends rejoice; if it dies, their sorrow is deep and heart-rending. If the child of the concubine lives, the parents consider it a misfortune; if it dies, they rejoice at their happy deliverance.

A child was to be born to Chesebrough and Josephine.

If that child had been the fruit of a marriage, he would have been the presumptive heir to a great estate, the scion of an old, wealthy and distinguished family. The event would have been hailed as a matter almost of public importance.

Being the child of an unlawful alliance, the conditions are entirely reversed, and the very wealth and position of the father and his family made it of the more importance that the event should be kept secret and the disgrace avoided. Having concealed the fact of pregnancy as long as possible, when the time for the birth is drawing near, they are found driving in a carriage into the Village of Saratoga Springs, 250 miles distant from their habitation and all their friends, at a season when the summer guests have departed and the village is deserted. They take a room at a hotel, and there, on the night of their arrival, without any previous arrangement having been made for its reception into the world, the child is born. A strange doctor is called in; a stranger, a chambermaid in

the hotel is installed as nurse, and none but strangers soothe the pains of the mother or help to care for the babe. The very clothes which are to cover its body have to be prepared after its birth. When it dies, as it naturally does under such treatment, they plant it (it can hardly be called a burial) in a stranger's lot (for which privilege this wealthy gentleman generously pays the munificent sum of three dollars), in a strange town, and none but strangers have ever since looked upon its grave. Not a tear seems to have been shed, or sorrow to have been felt, and it appears to have been considered a happy riddance from an impending misfortune. The mother did once ask to look at the face of the dead child, but the motive seems to have been curiosity rather than affection, while the father celebrates the event by a glorious drunk that night, and by losing all his money in a gambling saloon the next day (Vol. I, fols. 19-168).

Never was the child of honest parents and of an holy marriage born, buried and forgotten like this.

7. We have already seen, by the authorities we have freely quoted elsewhere, that reputation, to be of any value as proof of marriage, must be universal and not partial or divided.

Yardley Estate, 75 Pa., 207.
Rose *v.* Clark, 8 Paige, 573.
Brinckley *v.* Brinckley, 50 N. Y., 184.
Clayton *v.* Waddell, 4 N. Y., 23.

As Mr. Justice Lacome says, in his opinion:

> "A divided reputation is not sufficient to warrant inference of a marriage."

In our case there is no evidence whatever of any general reputation of marriage. Mr. Chesebrough was generally known as an unmarried man and Josephine as an unmarried woman. It is doubtful whether there was any one who really believed them

to be married. Some, perhaps, affected to believe it, because they preferred to be blind or it was for their interest not to see. The testimony even of the complainants' most friendly witnesses comes far short of showing that general and universal reputation which alone is of any value as evidence in proving a fact of this kind.

Of the friends of the woman, her mother, who knew the facts best, swears that Chesebrough "debauched and carnally knew the said Josephine Cre gier," and that the birth of Leonora was the result. The brother and sister, who resided at home with the mother when the child was born, and who were nearest Josephine's age, maintain a most significant silence. The mother, brother, cousins, relatives, friends and acquaintances of Mr. Chesebrough, generally, never heard of it. The few who claim to have heard a report of a marrirge give Gen. Storms as their authority. Even if we should go to the extreme possible length and credit such totally discredited witnesses as Mrs. Sisson and Mrs. Fitzgerald, the most that could be said would be that there was a partial or divided reputation, with a strong majority or preponderance upon our side.

8. The same may be said as to evidence of recognition. They recognized one another as husband and wife only when it became necessary to do so in order to conceal their illicit relationship and to obtain some temporary advantage or immunity thereby. There is not a single letter which is addressed to "wife" or "husband," or evidence of a single occasion when they called one another by that name, except when it was necessary to do so in order to cover up conduct, which they knew to be guilty and corrupt, with a temporary veneer of honesty. As between themselves, they apparently never used either of these sweet names.

Certainly there was no such general recognition of them by others or of each other among themselves as husband and wife, as the decisions require in order to make it evidence of marriage. They

were never so recognized by *his* mother or by *his* family or by *his* friends. Some few of *her* relatives and friends may have been deceived (although this is doubtful), but the seduction suit and the testimony of her mother and sister, given upon the trial of that suit, as well as the silence of the brother and other sister, shows how her immediate family regarded the relationship (Vol. VIII, fols. 1–215, and Vol. IX, fols. 25–78).

In every respect the evidence as to cohabitation, reputation and recognition, considered in the most favorable manner for the complainants, falls far short of proof of marriage. It is not such as "carries with it a natural belief that it results from marriage only." Their acts are far more like those of libertine and concubine, trying sometimes to cover up and conceal their true relationship than like those of husband and wife who have nothing to conceal.

4. A wife is treated with honor by her husband, and he requires all those around him, whether they are his equals, his superiors or inferiors, to treat her with appropriate respect.

I do not say that no husband ever treats his wife dishonorably or disrespectfully, or even that he never permits others to do so, but this is the exception and not the rule, and would be evidence rather of an unmatrimonial than a matrimonial relationship.

Most certainly would a proud, vain and high-spirited man like Blazius M. Chesebrough insist upon honor and respect being paid to his wife, by every one about him, and especially by servants and menials.

A concubine or a harlot is not treated with such honor and respect.

Mr. Chesebrough might permit his servants and menials to treat his mistress in a way which he would indignantly resent if she were a wife.

Bensel's evidence (Vol. VIII, fols. 217–473) and

Harran's evidence (Vol. I, fols. 293–1065) shows that it was the habit of Chesebrough's servants to address Josephine as "Joe," and speak of her to him as "Joe" or "Josie," and to treat her with familiarity that no proud or self-respecting man would ever allow any one, much less a servant, to exhibit towards a wife.

Peter Staeden's evidence, if we may believe it, shows that he introduced this girl as "Josie, my intended wife" (Vol. I, fol. 357). If it *had been* the woman on whom he really intended to bestow the honor of wifehood, and we can conceive that he would in any circumstances have given her an introduction to the barber who was to shave him, the introduction would certainly have been as "Miss Cregier."

If she had been a wife when Peter saw her afterwards, Mr. Chesebrough would never have spoken of her, in his presence, as "Joe," or "Josie;" and if it had been a wife about whom Peter was testifying, he would not have so far forgotten himself as to refer to her, even in his testimony, by the familiar name of Josie or Joe, as he does all through (Vol. I, fols. 262 and 263, 336 to 337, 351 to 410–412, &c.).

It may be said that these are only straws, but the peculiarity of this case is that the straws all point in one direction.

Not only does it appear that these people treated one another as libertines treat their concubines and as concubines treat the men who are base enough to follow them, but the humblest of those about them are quick to catch at their true relationship, and even when trying to say something else, unconsciously tell the story of a meretricious alliance.

10. When for any reason either or both the parties to a marriage unfortunately desire to end or suspend the relationship, it is done in some formal manner. Either a divorce or a legal separation is

obtained or some formal agreement is made by which they live apart under certain conditions, and it is always definitely arranged as to what share the wife shall have in the property or income of the husband, or what means of support he shall provide for her.

When a man and a woman desire to end an unlawful relationship, there is no such formality; they simply stop, and that is the end of it.

The most entire absence of formality characterizes the dissolution of whatever connection there was between Chesebrough and Josephine. She simply went away and left him, without asking his permission or bidding him good-by, and commenced, very soon thereafter, a like relationship with another man. It does not seem to have occurred to her or to him that either owed any duties to the other, or that the relationship was anything different from a tenancy at will. As long as it suited their mutual caprice, they lived together, and when one of them was tired of it, they separated without any more ado.

This is not the way in which the lawful relationship of husband and wife is terminated.

11. After husband and wife separate, provision has to be made for the support of the wife, especially if the husband is the one at fault, and it is certainly the theory of the complainants in this case, that whatever sins had been committed up to the time of the separation, were his sins and not hers.

Mr. Chesebrough was already a man of wealth, and on the death of his then aged mother, the expectant heir of a still greater fortune. Yet it does not seem to have occurred to Josephine that she had any rights as a wife, or any title to support from Mr. Chesebrough. The child of Rachel Cregier must certainly have inherited a desire for money, and a knowledge of its value, and it will be difficult to

convince any one, that if she had really been a wife, she would have waived the rights of a wife so cavalierly.

12. When a husband dies, the wife is entitled to administer upon his estate and to a generous share of his property, without regard to the question whether she had been a good and true wife or not. Her title depends upon her relationship, and not upon her virtue. When Mr. Chesebrough died he was a rich man. He owned absolutely in his own right his half of the Washington Heights Farm, valued into the millions, and a large amount of improved real estate in the City of New York, besides the share of his mother's estate, of which he received the income during his life.

Josephine's family and friends were here and were aware of Mr. Chesebrough's death. Rachel Cregier and Leonora attended the funeral together. Josephine, herself, came on shortly afterwards, and counsel were consulted on behalf of the united interests of the family. If she were his wife, she was entitled to dower in this large amount of real estate, as well as to her share of the personalty, and as a wife she was entitled to letters of administration.

It is hardly to be believed that she or her friends were so indifferent to the advantages of wealth as to take no steps to secure this fortune, unless she and they knew that she was not entitled to it.

13. When a man dies, his legitimate issue of a lawful marriage are entitled to his estate, except so much thereof as goes to the widow. In this case, Leonora, if she were the lawful issue of Mr. Chesebrough, was entitled, not only to his fortune, but to a moiety of the still greater fortune left by Mrs. Margaret Chesebrough, of which Blazius had been receiving the income during his life. No steps are taken to secure this for the benefit of Leonora. Although she was perhaps too young to move on

her own account, she was surrounded by people who were neither indifferent to her interests nor incompetent to protect them.

Rachel Cregier was living, and Rachel Cregier had never been bashful in asserting her rights, or in appealing to the Court to enforce them. George W. Cregier, her son, was then an officer of an important court, and probably acquainted with every lawyer in the city. They had able counsel, whom they consulted freely, as is shown by the testimony of Mr. Crosby, Gen. Butterfield and Mr. Henry Day, and yet no steps are taken and no claim is made.

Compared to the way in which these people all seem to slumber upon their rights, the sleep of Rip Van Winkle was only a fitful midsummer nap.

MARTIN B. BROWN, Printer and Stationer, 49 to 57 Park Place, N. Y.

FILED
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

1152

United States Supreme Court.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

vs.

CHARLES A. CHESEBROUGH, individually as Executor and Trustee under the last Will and Testament of Margaret Chesebrough and Elizabeth Lounsbury, as Executrix of the last Will and Testament of Stephen R. Lounsbury, deceased,
Defendants and Appellees.

Stipulation for Dismissal of Appeal.

At the time of the entry of the decree of the Circuit Court of the United States for the Eastern District of New York, dismissing the bill of the petitioners herein, the complainants in that suit, upon the merits, the construction of the Evarts Act was so unsettled and doubtful that the petitioners were advised by their counsel that the only safe practice for them to pursue was to take two appeals: one to the Circuit Court of Appeals upon the whole case; and the other to the Supreme Court of the United States upon the jurisdic-

tional question involved as to whether a Court of Equity had jurisdiction of the complainants' suit, and if not, whether the decree should not have been for a dismissal of the bill without prejudice instead of upon the merits. In view of the recent decision of the Chief Justice of the United States in the Circuit Court of Appeals for the Seventh Circuit, in the case of World's Columbian Exposition et al. *vs.* U. S., 56 Fed. Rep., 645, it is hereby *stipulated* and agreed that in case this Court shall consider that the pendency of this appeal is a bar to, or in any way prejudicial to the issuance of the writ of certiorari to said Circuit Court of Appeals, which is herewith applied for, then this appeal to this Court shall be dismissed at the costs of the appellants.

Dated March 16, 1894.

LEONORA A. ARNOLD,
THOS. E. ARNOLD,
Complainants and Appellants.

HENRY A. RAWCLIFFE,
Solicitor for Complainants and Appellants.

STATE OF NEW YORK, Southern District, } ss.:

On this 16th day of March, 1894, before me the subscriber personally came and appeared Leonora A. Arnold and Thomas E. Arnold, her husband, to me known to be the person described in and who executed the foregoing stipulation, and they acknowledged to me that they executed the same.

JOS. F. ARNOLD,
Notary Public,
N. Y. Co.

[SEAL.]

[illegible]

OCTOBER TERM, 1[illegible].

TERM No. 911.

LEONORA A. ARNOLD AND ANOTHER,
Complainants and Appellants,

against

CHARLES A. CHESEBROUGH AND ANOTHER,
Defendants and Appellees.

Papers on Motion to Dismiss.

WALTER S. LOGAN,
Of Counsel for Appellees.

LOGAN, CLARK & DEMOND,
Attys. for Appellees,
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New York.

New York.
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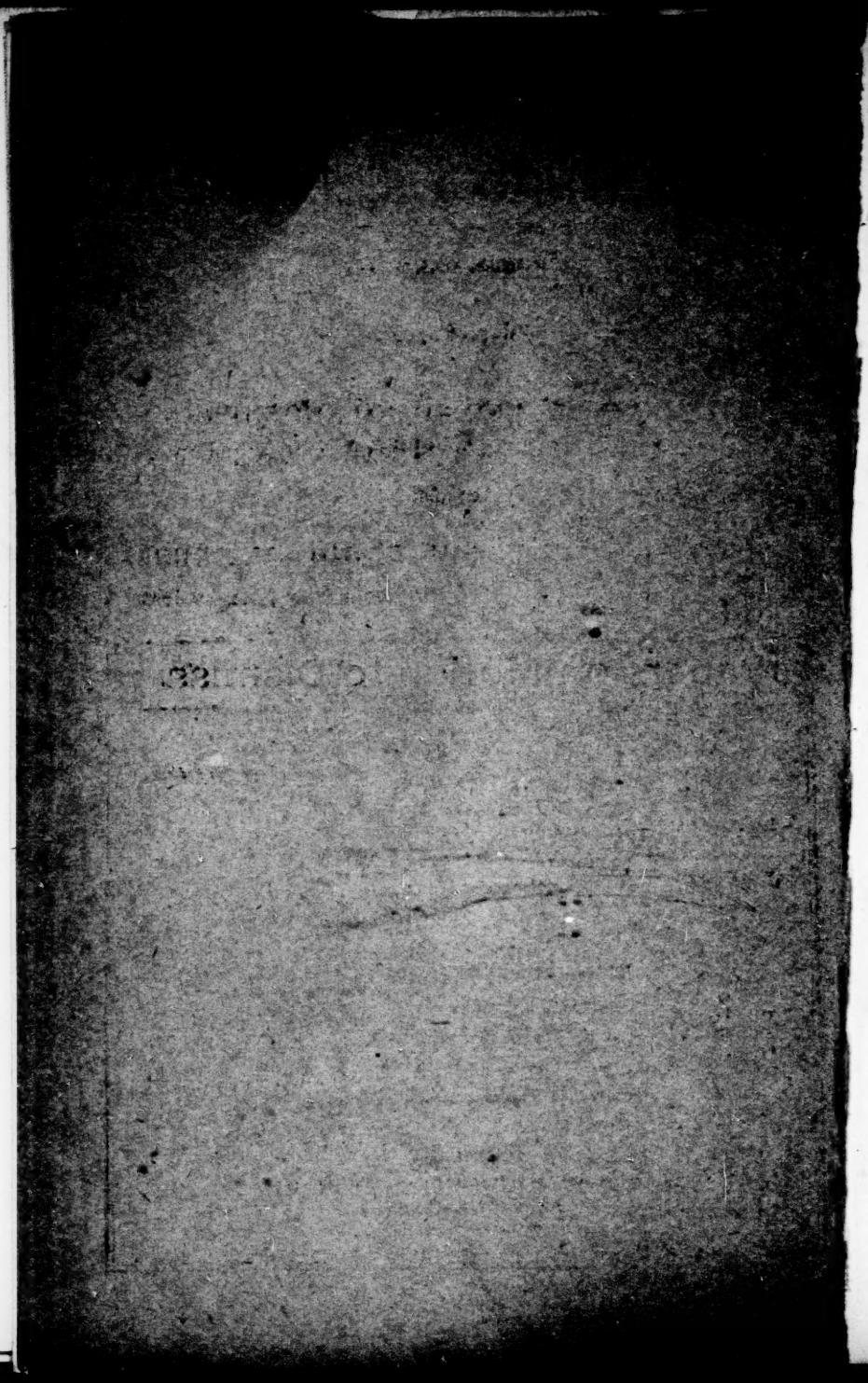

Supreme Court of the United States.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complts. and Applts., 2

against

No. 911.

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee, under the last will and testament of MARGARET CHESEBROUGH, and ELIZABETH LOUNSBURY, as Executrix, under the last will and testament of STEPHEN R. LOUNSBURY, deceased,
Defts. and Appellees. 3

Brief Statement of Facts and Object of Motion.

Now come the Appellees herein by counsel and move to dismiss the appeal herein for the following reasons, to wit:

4 This suit was begun March 13th, 1886, in the Circuit Court of the United States for the Eastern District of New York, and after the taking of testimony on June 30th, 1891, the cause was heard and a decision made by E. Henry Lacombe, Circuit Judge, dismissing the complainant's bill, and on December 21st, 1891, a decree was made dismiss- the bill pursuant to this decision.

A copy of this decision is hereto annexed, and marked Exhibit A, and of the decree and marked Exhibit A A.

On June 7th, 1892, the complainants procured
5 the allowance of an appeal from this decree to the Circuit Court of Appeals for the Second Circuit, and on that day the petition for appeal, the assignment of errors, and the bond for costs were filed, and a citation was issued returnable June 5th, 1892.

A copy of the assignment of errors is hereto annexed and marked Exhibit B. The record was filed and the cause docketed in said Circuit Court of Appeals, August 24th, 1892, and the case came on for argument before Judges Wallace, Shipman and Wheeler, on May 3rd, 1893. The opinion of the Court was handed down October 24, 1893, which opinion in all respects affirmed the decree
6 of the Court below. A copy of this opinion is hereto annexed and marked Exhibit C. The opinion was handed down by Judge Wallace and concurred in by Judge Shipman; Wheeler judge dissenting.

On November 13th, 1893, the appellants filed their petition for a re-hearing which was denied by order, dated December 12th, 1893. The appellants, on December 11th, 1893, moved the said Circuit

Court of Appeals for a certificate to the Supreme 7
Court of the United States, under the Act of March 3, 1891. This motion was denied December 12th, 1893. Costs for the appellees were taxed December 19th, 1893, and on February 28th, 1894, the Circuit Court of Appeals made its order affirming the decree of the Court below, and directed the issue of a mandate accordingly.

This suit is one in which, under the law, the decision of the Circuit Court of Appeals is made final, the jurisdiction of the Circuit Court being dependent entirely upon the opposite parties to the suit or controversy being citizens of different States.

8

That notwithstanding, such appeal was taken from said decree to said Circuit Court of Appeals, the Appellants on December 16th, 1892, procured the allowance of an appeal to the Supreme Court of the United States from the said decree of Mr. Justice Lacombe, filed December 21st, 1891, (being the very same decree which the complainants had appealed from to the said Circuit Court of Appeals) and on December 16th, 1892, the said petition for appeal, assignment of errors and the bond for costs were filed, and citation issued returnable at Washington, January 4th, 1893.

A copy of the assignment of errors so filed, is 9
hereto annexed and marked Exhibit D.

The appellants, after securing various extensions of time to file the record in the Supreme Court and to docket the case subsequently pursuant to order of Mr. Justice Wallace, dated March 15th, 1893, filed the whole record in the Supreme Court on April 1st, 1893.

The appellants did not procure any certificate

from said Circuit Court, certifying the question of jurisdiction or any other question to the Supreme Court, nor was the question of jurisdiction of said Circuit Court decided adversely to the appellants, but in their favor.

The appellees move, therefore, to dismiss this appeal upon the ground that the Supreme Court has no jurisdiction to hear and determine the same inasmuch as the appellants have elected to appeal from said judgment to the Circuit Court of Appeals for the Second Circuit upon the whole case, and said Circuit Court of Appeals has rendered its final decision against the appellants and for the appellees therein, and because "when the * * judgment is rendered the party against whom it is rendered must elect whether he will take his * * * appeal to the Supreme Court upon the question of jurisdiction alone or to the Circuit Court of Appeals upon the whole case," and because the appellants have elected to go to said Circuit Court of Appeals upon the whole case.

And because the appellants have not procured any certificate of said Circuit Court certifying the question of jurisdiction or any other question to this Court, and because the question of jurisdiction was not decided in said Circuit Court adversely to said appellants but in their favor.

By reason of these facts the appellees ask that this appeal be dismissed with costs.

New York, March 19th, 1894.

WALTER S. LOGAN,
Counsel for Appellees,
58 William Street,
New York.

SUPREME COURT OF THE UNITED STATES. 13

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Applts.,

against

CHARLES A. CHESEBROUGH, individually and as Executor, and Trustee, under the last will and testament of MARGARET CHESEBROUGH, and ELIZABETH LOUNSBURY, as Executrix, under the last will and testament of STEPHEN R. LOUNSBURY, deceased.
Defendants & Appellees.

No. 911.

14

Please take notice that upon the annexed affidavit of Walter S. Logan, and upon the annexed statement of motion, and upon the transcript of the record filed herein in the office of the Clerk of this Court, April 1st, 1893, before the Supreme Court of the United States at a term to be holden at Washington on the third Monday of April, 1894, at the opening of the Court on that day, or as soon thereafter as Counsel may be heard, a motion will be made on the part of the Appellees above named to 15
dismiss the Appeal herein on the ground that the Supreme Court of the United States has no jurisdiction to hear and determine the same.

WALTER S. LOGAN,
Counsel for Appellees,
58 William Street,
New York.

Dated New York, March 19th, 1894.

To JOHN H. V. ARNOLD, ESQ.,
Counsel for Appellants.

16 SUPREME COURT OF THE UNITED STATES.

LEONORA A. ARNOLD and THOMAS E. ARNOLD her husband,
Complainants and Applts.,

against

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee, under the last will
17 and testament of Margaret Chesebrough, and Elizabeth Lounsbury as Executrix, under the last will and testament of Stephen R. Lounsbury, deceased.
Defendants and Appellees.

No. 911.

State of New York,
City and County of New York, } ss:
Southern District of New York.

WALTER S. LOGAN, being duly sworn, says:

18 That he is counsel for the appellees above named, and that his appearance as such has been duly entered in the office of the clerk of this Court.

That this suit, solely by reason of the diversity of citizenship of the complainants and the defendants, was begun in the Circuit Court of the United States for the Eastern District of New York, March 13th, 1886; that thereafter a large amount of testimony was taken in the cause, and

after final hearing a decision was filed by Judge 19
Lacombe, before whom the cause was heard, on June 30th, 1891, which directed that the complainants' bill be dismissed. (A copy of this decision is hereto annexed and marked Exhibit A, and made part thereof).

Pursuant to this decision, on December 31st, 1891, a decree was filed dismissing the complainant's bill, a copy of which is hereto annexed, made part hereof and marked Exhibit AA. Subsequently on June 7th, 1892, the complainants procured the allowance of an appeal from said decree to the Circuit Court of Appeals for the Second Circuit, and on that day the petition for an appeal, the assignment of errors, and the bond for costs were filed, and a 20
citation issued returnable in said Appellate Court, June 5th, 1892. (The Assignment of Errors, as filed, is annexed hereto and made a part hereof, and marked Exhibit B) That subsequently the record on said appeal was filed and the appeal docketed August 24th, 1892.

Said appeal duly came on for argument before Judges Wallace, Shipman and Wheeler, on May 3rd, 1893, and on October 24th, 1893, the opinion of the Court was filed, affirming in all respects the decree of the Court below. (A copy of this opinion is hereto annexed and made part hereof, and marked Exhibit C.) This opinion was written by Judge Wallace and concurred in by Judge Shipman; Wheeler, judge, dissenting. 21

On November 13th, 1893, the appellants filed in said Circuit Court of Appeals, a petition for a rehearing, which on December 12th, 1893, by order, was wholly denied. On December 11th, 1893, the said appellants moved in said Appellate Court that the Circuit Court of Appeals certify to the Supreme Court of the United States their doubt as to various questions raised, which application was by order on December 12th,

22 1893, wholly denied, and on December 19th, 1893 the costs of the Appellees in said Appellate Court were taxed, and on February 28th, 1894, said Appellate Court made its order affirming in all respects the decree below, and directing that a mandate issue accordingly, which order is now on file.

That nevertheless and notwithstanding the taking of said Appeal to said Circuit Court of Appeals the said complainants and appellants on December 16th, 1892, and nearly a year after the entry of said decree of Mr. Justice Lacombe, entered December 21st, 1891, procured the allowance of an Appeal from said decree of said Circuit Court to
23 the Supreme Court of the United States, and on December 16th, 1892, the petition for said Appeal was filed together with the Assignment of Errors and bond for costs, and also on said date a citation issued returnable at Washington, January, 14th, 1893.

A copy of the Assignment of Errors on Appeal to this Court is hereto annexed and made a part hereof and marked Exhibit D.

That subsequently the appellants procured *ex-parte* extensions of time to file the record and to docket the case in this Court, one extension of time by order dated January 11th, 1893, extending the appellants' time to and including February 15th, 1893; and another by order dated February
24 14th, 1893, extending the appellants' time to and including April 26th, 1893.

That on March 15, 1893, Mr. Justice Wallace granted an *ex parte* order amending said order of February 14, 1893, and cutting down the Appellants' time to file the record to and including April 1st, 1893. This order was made upon an affidavit of deponent, and upon a certificate of the clerk of the Court, copies of which affidavit and

certificate are hereunto annexed and made part 25
hereof and marked Exhibits E. and F.

That subsequently by notice dated March 24th, 1893, the appellants noticed a motion for March 27th, 1893, to set aside the said order made by Mr. Justice Wallace, March 15th, 1893, cutting down the appellants' time to file the record herein to and including April 1st, 1893, and praying for an extension of time to April 29th, 1893. This application was wholly denied by the Court by order entered March 27th, 1893.

That on March 23rd, 1893, there was filed in the office of the clerk of this Court, Judge Wallace's order, dated March 15th, 1893, cutting down the time of the appellant's to file the record herein, 26
and on March 30th, 1893, there was filed with the clerk of this Court, the order of the Court below denying appellant's motion for further time.

That subsequently and on April 1st, 1893, the appellants filed the whole record in this case, and caused this case to be docketed in the office of the clerk of this Court.

That said record does not contain nor did the appellants procure any certificate of said Circuit Court, certifying the question of jurisdiction or any other question to the Supreme Court, nor was the question of jurisdiction of said Circuit Court decided adversely to the appellants. Said Court entertained jurisdiction and dismissed the bill on
the merits. 27

Deponent is informed and verily believes that the appellants, by having elected to take an appeal from the decree of the Circuit Court to said Circuit Court of Appeals upon the whole case, have precluded themselves from appealing to the Supreme Court of the United States from said decree upon the question of jurisdiction; that there is no other ground upon which an appeal to the Supreme Court of the United States would lie. That the

present appeal is not an appeal "from the final sentences and decrees in prize causes," nor is this a case of a "conviction of a capital or other infamous crime," nor is this a case "that involves the construction or application of the Constitution of the United States," nor is this a case "in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question," nor is this a case "in which the constitution or law of a State is claimed to be in contravention to the Constitution of the United States."

That this is a case, which, by the Act of Congress, approved March 3rd, 1891, to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes, the decree of the Circuit Court of Appeals is final, pursuant to Section 6 of said Act, for the reason that it is a case "in which the jurisdiction is dependent entirely upon the opposite parties of the suit or controversy being * * citizens of different States."

Deponent is further advised and believes that if the said appellants had desired to appeal to the Supreme Court of the United States from said decree upon the question of the jurisdiction of the Circuit Court, they should have appealed to this Court upon that question alone, and should not have appealed upon the whole case to the Circuit Court of Appeals, and that by having elected so to appeal to said Circuit Court of Appeals they are bound by the decision therein, and must secure any relief that they may desire in that proceeding; that said Circuit Court of Appeals have refused a re-hearing, have refused to certify to the Supreme Court any question or proposition of law, concerning which said Appellate Court might desire the instruction of the Supreme Court for its proper

decision, and that the sole remaining remedy of 31
the appellants is to apply to this Court for a writ of certiorari to said Circuit Court of Appeals, pursuant to Section 6 of said Act of March 3d, 1891.

Deponent is further advised that this Court will not entertain jurisdiction of this appeal, because the question of jurisdiction of said Circuit Court was not decided adversely to the appellants and because these appellants have not procured, nor does the record contain any certificate of said Circuit Court certifying the question of jurisdiction or any other question to this Court.

Wherefore for the reason that this Court has no jurisdiction to entertain, hear and determine this appeal the appellees respectfully pray that this 32
appeal be dismissed with costs. This affidavit is made by deponent because he has personal knowledge of all the facts stated herein, and the appellees have not such knowledge.

WALTER S. LOGAN.

Sworn to before me this
20th day of March, 1894.

Geo. A. Baker,
Notary Public.
N. Y. Co.

33

[Notarial Seal.]

34 **EXHIBIT A.**

Opinion.

LACOMBE, *Circuit Judge.*—This is an action brought by Leonora A. Arnold, who claims to be a legitimate daughter of Blasius More Chesebrough against the executors and trustees under the will of his mother Margaret Chesebrough, deceased, such will directing that upon the death of Blasius (an event which happened in 1866), one equal half part of her residuary estate should be paid to his lawful issue, if any.

It is not disputed, upon the proofs, that the complainants mother is Josephine, a daughter of Mrs.
35 Rachael Cregier, nor that her father was Blasius M. Chesebrough. It appears that she was born (October 8, 1857,) in the house of her grandmother (Mrs. Cregier) in this city, and that for several years prior thereto her father and mother lived together as man and wife, in hotels, in boarding houses, in apartments, and also at her grandmother's. It is essential to the complainant's case, however, that the fact of a marriage between her father and mother should be shown by competent evidence to the satisfaction of the Court. The question to be determined is a question of fact, to be settled upon a consideration of all the competent and relevant evidence in the case; it is a fact which, at the close
36 of the case, the complainant must show to be established by a fair preponderance of proof. As the evidence is being put in, the weight in either scale may vary and such preponderance may shift from side to side, but the burden of proof which the complainant assumed, when she filed her bill, she must show herself able to sustain, when the case is closed, or she has failed. There is no presumption of law in such a case (Blackburn v. Crawford, 3 Wall., 186). Such presumptions of fact, or rather such unprov-

ed inferences from proved circumstances as human 37
experience will warrant the trier of the facts in drawing, may constantly vary, may be of greater or less force, controlling of the final decision or of no effect thereon, just as there may be change in the number and character of those proved facts from which it is sought to draw the inferences; and the final conclusion must be drawn with a due regard to the entire body of competent and material proof.

Marriage may be proved by circumstantial evidence, by proof of the acts and declarations of the parties, of their cohabitation as husband and wife, holding themselves out to the world as sustaining that honorable relation to each other. But neither such a course of life nor such declarations *make* a 38
marriage, nor do they even directly or affirmatively establish it. They may, if satisfactorily proved and sufficiently strong, be legitimate grounds for inferring that there has been a valid marriage—a contract that is (with or without any ceremony) whereby at some time and place the parties agree together per *verba de presenti* to be husband and wife, following that agreement by cohabitation as such. Whoever asserts a marriage as the basis of a claim at law or equity must satisfy the Court, upon the whole case, by a fair preponderance of proof—not necessarily where and when such contract was made—but that at some time and place it was made. If it is sought to prove that fact by circumstantial 39
evidence, the triers of the fact must first determine what circumstances are fairly proved, and then decide whether all those circumstances taken together constrain the mind to accept the inference that such contract was made.

Blasius M. Chesebrough, who claimed to have purchased a title of nobility in Austria and liked to be known as "Count," is described, truthfully enough, by counsel, as a very eccentric man, bombastic, pompous and extravagant; but this by no

40 means completes his picture. He was under no restraint, self-imposed or otherwise, absolutely selfish, seeking pleasure in the constant gratification of his sensual appetites, reckless, roystering, dissipated, rarely completely sober, a frequenter of bawdy houses, a bad son, a mere brute when inflamed with drink, and yet contemplating himself and his position in the community with a self-complacent conceit, which esteemed "Count." Chesebrough as something superior to mere common clay.

In 1854 when he first encountered Josephine Cregier (though some testimony would make the date 1853), he was about thirty-five years of age and she was sixteen. They met at Sirocco's dancing rooms
41 in Bond Street (Blasius having appartments in the same building), and that same night she shared his bed. Shortly thereafter she left her mother's home and lived with him in Bond Street and elsewhere, and the testimony is uncontradicted that for weeks certainly, probably for months, they maintained a meretricious connection. It is contended by the complainant that subsequently in 1854 they were married in the City of Baltimore, whither they made a trip for that express purpose, and Josephine herself, testifying for the complainant, gave direct evidence to that effect. Subsequently, when called by the defendants, she retracted her former statement and testified that she was never married to Blasius M. Chesebrongh in Baltimore or elsewhere. If her
42 latter testimony were to be accepted, there need be no further inquiry. Certainly, in view of her admitted perjury, the complainant cannot insist that her testimony affords direct proof of a marriage. If her evidence both ways on that point be disregarded such proof can only be found, if at all, as a necessary and natural inference from all such circumstances as are established by the testimony of credible witnesses

To discuss at length this testimony, extremely

voluminous and a large part of it taken under exception, is wholly unnecessary. The point to be decided is purely a question of fact. The conclusion reached, after consideration of a multitude of circumstances peculiar to the case, would be of no value as a precedent in other cases where the circumstances were not identical. It will be enough, therefore, to indicate, with great brevity, some of the reasons which lead to the conclusion that Blasius M. Chesebrough and Josephine Cregier were not husband and wife. 43

The intercourse was originally meretricious, and there was no reason why Blasius should change it. Marriage was not needed as the price to be paid for the gratification of some passion. The girl had already yielded, apparently without much objection, to his solicitation, and was living with him as his mistress. That marriage was a reparation which he ought to make to her for having gratified his passion at the sacrifice of her virtue was an idea which there is certainly no reason to suppose would ever have entered the head of Blasius Chesebrough, nor been entertained there long had it been suggested by another. Until the time when they separated in 1858, they lived together as husband and wife, to the extent at least of sharing the same rooms and indicating to hotel keepers, dressmakers, servants and others with whom they necessarily had occasion to come in contact that their relationship was a proper one. Standing alone such testimony would be very strong evidence in support of an asserted marriage, but it is also the way in which man and mistress frequently live, in which it may be said they must live if they frequent respectable hotels, and, when it appears that their living thus together began illicitly, something more than mere continuance, coupled with such declarations as would make that continuance pleasant for them, is needed to support an inference that they were married. There seems to be 44 45

46 nothing to distinguish the cohabitation which immediately succeeded the first meeting at Sorocco's from the cohabitation which followed the month of October, 1854, when it is claimed they were married in Baltimore. There is nothing to exclude the natural inference that the former relation continued, nor to satisfactorily prove that it had been changed into that of an actual marriage by mutual consent.

The declarations of Blasius made subsequently to their separation may be disregarded. As to the statements that they were married, made during such intercourse to hotel-keepers and to other persons at a time when a respect for appearances called for such statements as essential to comfortable living in
47 decent quarters, and to the contrary statements made to boon companions or loose women, whose questions he might resent as referring to what was none of their business, it may be said that they are entitled to little weight; probably a lie one way or the other was of little matter to Blasius. Of general public recognition by acquaintances beyond those casually encountered in the vicinity of his residence, of introduction to his family, of declarations to his relations, or, at least, to those with whom he was on good terms, which would naturally be expected from a husband, there is no satisfactory proof; practically, the only evidence as to such declarations is that of Christian Storms.

Inasmuch as they lived together for several years,
48 it is quite natural that the question what relation they bore to each other suggested itself to other members of his family. In such cases evidence of repute in the family is admissible. Without discussing at length the evidence of the various members of the Storms family (other than Christian), whose source of information seems to have been their father (a gentleman who in his lifetime put himself on record, under oath, as believing Blasius to be unmarried), it is sufficient to say that the repute in

the Chesebrough family was divided, and the same 49
may be said of a repute among his associates and friends. But a divided reputation is not sufficient to warrant the inference of marriage (Clayton *v.* Wardell, 4 N. Y., 230; Brinkley *v.* Brinkley, 50 N. Y., 184)

As to the reputation in the Cregier family, it is to be noted that the evidence of the cousins, Mrs. Irving and Mrs. Franklin, and of the sister-in-law, Mrs. George W. Cregier, is principally, if not wholly, based upon what they heard from Mrs. Rachel Cregier. The same ought, perhaps, to be said of the evidence of Josphine's sister, Almira, (Mrs. Sisson), who was but nine years old when the intercourse began, and twelve years old when it terminated.

Rachel Cregier is deceased, but it appears that in 50
1859 she brought a suit in the Superior Court for the seduction of Josephine against Blasius, alleging that the connection between them continued between April 1st, 1853, and November 16th, 1857, and that complainant was born October 9, 1857, as the result of such unlawful connection; and further, that about October 1st, 1855, he enticed Josephine away from her mother's house and kept her away two months. The case was tried on inquest, before Judge Woodruff and a jury, Mrs. Cregier and the sister Almira were examined as witnesses, and there was a verdict for the plaintiff therein of $2,500 (which was subsequently paid). In view of this piece of record
evidence it is difficult to see how it can be con- 51
tended that there was a reputation of marriage in the Cregier family. Certainly no declarations of Rachel to that effect, nor any testimony as to the belief of others, whose information was derived from her, are entitled to much weight. She might have sought to save her daughter's reputation among other members of the family by saying she was married, but it must be assumed that she stated what she believed to be the truth when she brought

52 the suit and testified on the trial. The complainant objected to the admission of the record and judgment roll in this seduction suit. It is well settled that in cases of pedigree family conduct is admissible evidence from which the opinion and belief of the family may be inferred. The judgment roll may fairly be considered competent evidence of family conduct; but if it be not, and if all evidence of the declarations of Rachel Cregier were excluded from the case as hearsay, then there would be left, practically, no evidence of repute in the Cregier family, except that given by Almira Sisson, which, as she was of such tender age at the time, is certainly of but little weight.

53 Finally, though Blasius was liberally supplied with money, and after his mother's death in 1860, was a man of abundant means, Josephine never made any claim upon him during the eight years of his life subsequent to the separation, nor for fourteen years after his death did she assert any claim to the large estate which he left.

Considered together, the testimony is not sufficiently strong to constrain the mind to accept it as a natural inference that the arrogant, selfish, dissolute man of thirty-five ever married the young girl of sixteen, whose feeble virtue yielded so promptly to his solicitations, who began life with him as his mistress, and who left him without any effort to obtain from him, or from his estate, the

54 support which the law secured to her, if she were his wedded wife.

June 30, 1891.

E. Henry Lacombe.

(Endorsed)—Opinion.—Filed June 30, 1891.

Exhibit A A. 55

At a Stated Term of the Circuit Court of the United States for the Eastern District of New York, held on the 16th day of December, in the year of our Lord one thousand eight hundred and ninety-one.

Present:

The Hon. E. Henry Lacombe,
Circuit Judge.

Leonora Augusta Arnold and Thomas E. Arnold, her husband, Complainants. 56

against

Charles A. Chesebrough, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough and Elizabeth Lounsbury, as Executrix under the Last Will and Testament of Stephen R. Lounsbury, deceased.

Defendants. 57

This cause having come on to be heard upon the bill of complaint herein, the separate answers thereto of each of the defendants, the replication of the complainants to such separate answers, and the proof, oral, documentary and written, taken and filed in said cause, and the jurisdiction of this Court over this action being in issue, and said

58 cause having been argued by counsel for the respective parties, to wit:

By Mr. John H. V. Arnold and Mr. Walter R. Beach on the part of the complainants, and Mr. George Bliss and Mr. Walter S. Logan on the part of the defendant Charles A. Chesebrough, and no one appearing on behalf of the defendant Elizabeth Lounsbury; now, therefore, on consideration thereof, it is

Ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree as follows:

That this Court has jurisdiction of this action. And

That the defendants have judgment upon the
59 merits against the complainants dismissing their said bill of complaint, but without costs.

E. HENRY LACOMBE.

(Endorsed)—Decree dismissing bill of complaint.

Filed and entered Dec. 21, 1891.

60

Exhibit B. 61

CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband, against CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of Margaret Chesebrough and Elizabeth Lounsberry, as Executrix, under the Last Will and Testament of Stephen R. Lounsberry, deceased, Defendants and Appellees.	In Equity. 62

In pursuance of and obedient to Rule 11, promulgated and adopted by the United States Circuit Court of Appeals, for the Second Circuit, the above named complainants and appellants respectfully make the following assignment of errors in the above entitled case, to wit: 63

FIRST.—That the Court erred in holding that the testimony in this case is not sufficiently strong to, and does not constrain the mind to accept it as a natural inference that Blasius M. Chesebrough and Josephine Cregier, the father and mother of the complainant Leonora A. Arnold, were ever married.

SECOND.—That the Court erred in not holding that

64 the testimony in this case is sufficiently strong to and does constrain the mind to accept it as a natural inference that they were married.

THIRD.—That the Court erred in holding that the evidence in this case does not establish that they were married.

FOURTH.—That the Conrt erred in not holding that the evidence in this case does establish that they were married.

FIFTH.—That the Court erred in holding that they were not married.

65 SIXTH.—That the Court erred in not holding that they were married.

SEVENTH.—That the Court erred in holding that the intercourse between them was in the first instance meretricious, and that Josephine first lived with him as his mistress, and that this intercourse and relation between them was not changed.

EIGHTH.—That the Court erred in not holding that the intercourse between them was never meretricious, but lawful and matrimonial, and that Josephine did not live with him as his mistress, but as his wife.

66

NINTH.—That the Court erred in holding that the cohabitation between them was originally meretricious, and that the same was not changed thereafter into a lawful and matrimonial cohabitation.

TENTH.—That the Court erred in holding that Josephine did not, during the life of Blasius, nor for fourteen years after his death, claim to be, or to have been his wife at any time.

ELEVENTH.--That the Court erred in not holding 67
that Josephine did, during the life of Blasius, and after his death, claim to be and to have been his wife.

TWELFTH.—That the Court erred in holding that the dismissal of the bill of complaint herein should be one upon the merits; whereas the Court should have held that such dismissal should be one not upon the merits, and without prejudice to any rights, remedies, suits, actions, proceedings or other acts, either at law or in equity, or otherwise, which said complainants, or either of them, then or thereafter might have, possess, acquire, take, prosecute, defend or invoke. 68

HENRY ALONZO RAWCLIFFE,
Solicitor for Complainants and Appellants.

JOHN H. V. ARNOLD,
Of Counsel for Complainants.

(Endorsed)—Assignment of Errors.—Filed June 7, 1892.

69

69 **Exhibit C.**

U. S. CIRCUIT COURT OF APPEALS.

ARNOLD, ET AL.
Appellants.

vs.

CHESEBROUGH, ET AL,
Appellees.

71 WALLACE, Circuit Judge:

The dismissal of the bill of complaint by the decree of the Circuit Court proceeded upon the ground that Leonora A. Arnold, the principal complaint, was not the issue of a marriage between her mother and Blasius M. Chesebrough. The question which this appeal requires us to decide is whether Mrs. Arnold's father and mother were husband and wife. The decision depends upon the effect of direct evidence relative to a ceremonial marriage between the parents, and of indirect or presumptive evidence indicating the matrimonial relation arising from their cohabitation and repute, conduct and declarations.

72 In such actions the burden of proof is upon the party who asserts the marriage; but the law presumes from considerations of decency and public well being that every competent couple who ostensibly cohabit as husband and wife, demeaning themselves toward each other as such, and received into society and treated by friends and relatives as being entitled to that status, have been legally married This presumption is indulged with special co-

gency when the legitimacy of the offspring is the issue for judgment. A perfect marriage may be constituted by the consent of the parties to live together as husband and wife, as well as by a ceremonial marriage, and either form of marriage may be proved by any circumstances justifying the deduction as well as by direct evidence. But in the absence of direct proof marriage cannot be proved by cohabitation alone however long maintained; the evidence must support a matrimonial cohabitation as distinguished from a meretricious one. Commonwealth vs. Stump, 53 Penn. St., 132; Rose vs. Clark, 8 Paige, 573; Cunningham vs. Cunningham, 2 Dows Parl. Rep., 482. The facts that parties have publicly acknowledged each other as husband and wife, have assumed the marriage rights, duties and obligations, have been generally reputed in the place of their residence to be husband and wife, are relevant to prove a contract of marriage between them. Both cohabitation and reputation are necessary to establish a presumption of marriage where there is no proof of actual marriage. A divided repute, however is of no efficacy. It must be a general and consistent one to be of value. We have to apply these rules of evidence to a voluminous mass of testimony, much of which is untrustworthy, and eliminating from consideration much in the record which is incompetent. We cannot undertake to recapitulate the testimony, or analyze it in detail, as it would serve no useful purpose to do so. 73 74 75

The facts in outline are these: Leonora A. Arnold was born at New York City in October, 1857. Her father was Blasius M. Chesebrough and her mother was Josephine Creigier. The father and mother met at a dancing school in New York City, where they both resided, in 1854, and on the evening of their first meeting she accompanied him to his rooms and remained with him during the night.

76 She was then about sixteen years of age, and was living with her mother, who kept a boarding house. He was about thirty-five years of age and was an ostentatious, dissolute, lewd, eccentric man, addicted to drink, capricious and extravagant. He had studied law, but becoming enamored of the stage had devoted himself to theatrical enterprises. He associated generally with low companions. He had inherited some property, but derived the larger part of his income from the allowances made to him by his widowed mother, a woman of wealth, whose children seldom visited her except to obtain money, and who led an isolated life. He had one brother, but seldom met
77 him. Shortly after the episode mentioned Josephine left her mother'e house and went to live with him. They lived together at various hotels and boarding houses in New York City from 1854 to 1858. Whether they lived together continuously does not satisfactorily appear, but they certainly lived together the greater part of the time. She went by the name of Mrs. Chesebrough; and they held themselves out as husband and wife whenever it seemed expedient or desirable to do so; but she passed as his mistress among those of his associates to whose opinion of his respectability he was indifferent. They made occasional journeys, sometimes with his own equipage, to distant parts of the country. In September, 1855, while they
78 were at the United States Hotel, at Saratoga Springs, a child was born to them, died at its birth, and was buried at that place. It would seem that they selected this place, after the close of the conventional season, to have the acouchment take place there.

When the birth of a second child, Leonora, was expected, they went to live with Mrs. Cregier, Josephine's mother. Leonora was born at Mrs. Cregier's house. He was frequently intractable, and when

in drink was quarrelsome and violent. Apparent- 79
ly she wearied of his caprices and abuse. In 1858 she left him clandestinely, going first to South Carolina and subsequently to Tennessee, and lived while in these States with one Jackson as his wife. Leonora was left in the meantime at the house of Mrs. Cregier. Her father did not support her, and she was provided for by Mrs. Cregier until the latter's death which took place in 1870. In 1858, Mrs. Cregier sued him for six months' board of himself and family and obtained a judgment for $175. In 1859, Mrs. Cregier brought suit against him for the seduction of Josephine, claiming in substance that the relations had been illicit while he and Josephine lived together, and that Leonora was the fruit
of their unlawful cohabitation. Mrs. Cregier and 80
one of Josephine's sisters were witnessess at the trial of that suit. Blasius did not interpose any defense, and a judgment was obtained against him for $2,500 and subsequently collected. Mrs. Chesebrough, the mother of Blasius, died in 1860, and he then succeeded to a large property. He died in 1866, having lived as a bachelor since Josephine left him, ignorant of her whereabouts. He left no will. Leonora and Mrs. Cregier attended his funeral. In 1868, Josephine returned for a time to New York. While there she with her mother consulted counsel with a view of enforcing any rights which could be claimed by them or Leonora against the
estate of Blasius: Soon after her grandmother's death 81
Leonora made a visit of a few monthe to her mother in Tennessee, and then returned to New York. Thereafter she lived part of the time with her relatives, and part of the time supported herself by her own exertions. Between the visit to her mother in 1870 and 1880 she never heard from her mother. In 1879, Leonora married Mr. Arnold, and in the Fall of that year, induced by the representations of designing persons who had been

82 conversant with the affairs of Blasius, he began to collect evidence to set on foot the attack which culminated in the present suit. In 1880, Leonora went to Tennessee to find her mother and secure her assistance, and found her. Shortly afterward, Josephine came to New York. Until this time neither of them had taken any legal proceedings founded upon any alleged rights as the wife or daughter of Blasius.

The only evidence of a ceremonial marriage which appears in the record consists in the testimony of Josephine, the alleged wife. She testified as a witness for the complainants that after she and Blasius had lived together some time they went to Baltimore, Maryland, and were married there
83 by a clergyman, at his house. She could not give his name or residence, and stated that no witnesses were present. She made no mention of a marriage certificate or a wedding ring. The testimony did not offer any details tending to fix the place where the alleged marriage took place, or the person performing it, or the attendant circumstances. It suffices to say of it that it was improbable and incredible. She did testify, however, that while in Baltimore they stopped at Barnum's Hotel. It is in proof that no persons of their name were guests of that hotel. There was no publication of marriage, and no license to marry; and in the absence of a licence it would have been a
84 criminal offence on the part of a clergyman to perform the ceremony. At a later stage in the taking of the proofs she testified as a witness for the defendants and made a complete retraction of her previous testimony relative to the ceremonial marriage. She then testified that there never was a ceremonial marriage, and that during the time they lived together she never believed or considered herself the wife of Blasius. When asked, however, if anything had been said between them rela-

tive to a marriage, she stated that he had promised her that he would marry her when his mother should die, but she gave no details as to the time, occasion or circumstances of such a conversation. Of course no credit ought to be given to the testimony of a witness who has committed bald perjury. We cannot say whether she testified truthfully in her original or in her subsequent testimony. Certainly if any of her statements can be accepted as credible it is only those which it would be against her probable interest or inclination to make. We may believe that on the first occasion when she met Blasius she surrendered her person to him and that she lived with him for some period of time before the alleged ceremony of marriage, and that she left him clandestinely and lived in the south as the wife of another man until after his death. She testified to these facts originally when she was trying to appear as a semi-respectable woman, and as to them did not recant in her subsequent testimony; but her testimony is worthless as to every other material fact which she might suppose would be of benefit to either of the parties. 85 86

We must reject as unworthy of credit the direct evidence of marriage. If there was a promise to marry her at some future time, *com copula*, there was no marriage according to the law of their domicile. Cheney vs. Arnold, 15 N. Y., 345; Meister vs. Moore, 96 U. S., 76. The indirect evidence arising from cohabitation and repute, and the acts and declarations of Josephine and Blasius, satisfies us that the relation was a meretricious rather than a lawful one. As the question is wholly one of fact we shall content ourselves with a few general observations upon the proofs. 87

Irrespective of the admissions of Josephine the testimony satisfies us that the cohabitation was illicit in its origin.

88 This being so it is presumed to have continued illicit, and all presumptions in favor of the innocence and morality of the parties are repelled. Men sometime marry their mistresses, but such cases are the exception. After there has been an open illicit commerce they seldom accord to the woman who has forfeited all claims to her own self respect and to the countenance of her friends, the rights of a wife. The ordinary presumption against a subsequent marriage is stronger than usual in this case because each of the parties regarded the marriage tie with contempt. He was a frequenter of houses of ill-fame. Her notions of propriety are shown by her summary abandonment of her infant child and becoming the mistress
89 of Jackson.

The reputation of the relation was at best a divided one. It was convenient,and indeed for some purpose was necessary,that they should maintain the semblance of a matrimonial relation. If they had not done so they would not have been received in such hotels and boarding houses as suited his ambitions tastes. Some of their acquaintances would have ignored them. Tradesmen would have been less indulgent. Even their servants would have treated them with less civility. It would be strange if some of those with whom they came in contact had not been led to believe them to be married. None of his relatives supposed him to
90 be married. His boon companions understood her to be his mistress. Some of her relatives and acquaintances doubtless believed that she was his wife. No one was so near to her, or so likely to have a better appreciation of the true nature of the cohabitation as her own mother. Mrs. Cregier was a hard-headed, practical woman. What she believed is sufficiently shown by the record of the seduction suit.

Convincing evidence that they were not hus-

band and wife is found in their own conduct. 91
Unless they had so deported themselves that it was notorious she was only his mistress, there was no reason why he should not have introduced her to his mother as his wife. Neither her education, her manners or her social surroundings stood in the way. There was nothing except her relations with him.

Old Mrs. Chesebrough would have rejoiced to know that her son had married a decent woman. As a married man who had finally concluded to change his mode of life, he could have appealed more effectually than before to his mother's bounty. If Josephine had been his wife why should he have made a secret of the fact and re- 92
presented her deliberately to decent persons as being only his mistress? Such a significant episode as that detailed by the manager of the Clifton House, at Niagara Falls, where they represented themselves as man and wife until they quarreled, but finally admitted what their true relation was, cannot be explained away upon any theory of his eccentricities. He was not so utterly bereft of manly impluses as to permit her, if she had been his wife, to be ejected from the hotel as a mistress, and sent to New York, while he continued to remain there as a guest. He made conveyances of real estate as a single man. He submitted without protest to the making of a judicial record which branded her as a concubine and his 93
child as a bastard. Her conduct in leaving him without making any claim against him for support, and in making no such claim during his life, or against his estate until fourteen years after his death proves almost irresistibly that she knew she could not establish such a claim. She knew of his death about the time it took place, must have known as his wife she could secure a comfortable fortune from his estate, and she had consulted

94 astute counsel. We place but little stress upon the circumstance that he did not recognize Leonora as a legitimate child by any testamentary disposition. We are not satisfied that he knew the contents or the effect of the will which was drawn but not executed. He always acknowledged her paternity and evinced sometimes some interest in her and even effection for her. He would not have been unwilling to curtail the inheritance of his brother even in favor of an illegitimate child. Yet there is in proof no single act of his towards Leonora, after her mother left her, to indicate that he regarded her as having any lawful claim upon him.

95 Mrs. Cregier was a capable and energetic woman. She took the place after Josephine disappeared of father and mother to Leonora. She knew how to find plenty of lawyers to take up litigations upon contingent rewards. When Blasius died, and the proofs were fresh of the relation between him and Josephine, the time had come when she could have asserted Leonore's rights, if she had any, with the prospect of securing for her grandchild and incidentally for herself, the comforts of an ample fortune. But although she and Josephine concerted together, surveyed the ground, and consulted enterprise counsel, no attack was made throughout the four years she lived after the death of Blaisus. Her inaction is unaccountable,

96 except upon the theory that she felt satisfied there was no case sufficiently strong to warrant the attempt. She speaks from the grave, an unsummoned witness, whose testimony is more persuasive than that of a score of persons, who with fragmentary knowledge or confused recollection, speak of incidents which took place twenty years before.

It has been observed by the courts that the concomitants of those living in illicit intercourse together are often identical with those of married

people. Breadalbine vs. Breadalbine, H. L. S., 97
182; Goldbeck vs. Goldbeck, 18 N. J. Eq., 42; Barnum vs. Barnum, 42 Md., 251. It is not surprising that to some extent there should have been a repute that Blasius and Josephine were married. It is not strange that Leonora, a motherless child practically, should have gone by the name of Cheseborough. It is not strange that the infant, who died at the hotel where they had registered and lived as though married, should be buried as the child of Mr. and Mrs. Chesebrough. In our judgment there is hardly an established fact in the record which is inconsistent with the theory that they held themselves out as husband and wife merely for motives of expediency, while the pre- 98
sumptions from facts well proved, and the considerations arising from most demonstrative conduct, denote that the real relations did not exist.

The decree is affirmed with costs.

99

100 **EXHIBIT D.**

CIRCUIT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband,
Complainants and Appellants,

against

101

CHARLES A. CHESBROUGH, individually and as executor and trustee under the last Will and Testament of MARGARET CHESBROUGH, and ELIZABETH LOUNSBURY, as executrix under the last will and testament of STEPHEN R. LOUNSBURY, deceased,
Defendants and Appellees.

Assignment of errors on appeal. In equity.

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102 In pursuance of and obedient to the rules and practice of the Supreme Court of the United States and of the statutes in such case made and provided, the above named complainants and appellants respectfully make the following assignment of errors in the above entitled case, to wit:

First. That said Circuit Court erred in holding that it had jurisdiction of this action and the subject matter thereof.

Second. That said Circuit Court erred in holding 103
that the defendants were entitled to judgment upon the merits against the complainants herein, for the dismissal of their bill of complaint, whereas, it should have been held that such dismissal, if any at all, should be one, not upon the merits, but one without prejudice, to any rights, remedies, suits, actions, proceedings or other acts, either at law or in equity or otherwise which complainants or either of them then or thereafter might have, possess, acquire, take, prosecute, defend or invoke.

Third. That the Court erred in holding that it had jurisdiction of this action as one in equity and that it had jurisdiction or power to adjudge or 104
determine, that the complainant, Leonora A. Arnold, was not the lawful issue of Blasius M. Chesebrough, and as such, entitled as his heir-at-law, to take the property devised in and by the last Will and Testament of Margaret Chesebrough, deceased.

Fourth. That the Court erred in holding that the testimony in this case is not sufficiently strong to, and does not constrain the mind to accept it as a natural inference that Blasius M. Chesebrough and Josephine Cregier, the father and mother of the complainant, Leonora A. Arnold; were ever married. 105

Fifth. That the Court erred in not holding that the testimony in this case is sufficiently strong to and does constrain the mind to accept it as a natural inference, that they were married.

Sixth. That the Court erred in holding that the

106 evidence in this case does not establish that they were married.

Seventh. That the Court erred in not holding that the evidence in this case does establish that they were married.

Eighth. That the Court erred in holding that they were not married.

Ninth. That the Court erred in not holding that there were married.

107 *Tenth.* That the Court erred in holding that the intercourse between them was in the first instance meretricious, and that Josephine first lived with him as his mistress, and that this intercourse and relation between them was not changed.

Eleventh. That the Court erred in not holding that the intercourse between them was never meretricious, but lawful and matrimonial, and that Josephine did not live with him as his mistress, but as his wife.

Twelfth. That the Court erred in holding that
108 the cohabitation between them was originally meretricious, and that the same was not changed thereafter into a lawful and matrimonial cohabitation.

Thirteenth. That the Court erred in holding that Josephine did not, during the life of Blasius, nor for fourteen years after his death, claim to be, or to have been his wife at any time.

Fourteenth. That the Court erred in not holding that Josephine did, during the life of Blasius, and after his death, claim to be and to have been his wife. 99

Fifteenth. That the Court erred in not holding that the complainants were entitled in this action, to the judgment or relief or some part thereof, prayed for in their bill of complaint herein.

Dated, December 15th, 1892.

HENRY ALONZO RAWCLIFFE,
Solicitor for Complts. & Defts.

JOHN H. V. ARNOLD, 100
Of Counsel for Complts. & Applts.

101

112 **EXHIBIT E.**

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her husband, Complts. & Applts., against CHARLES A. CHESEBROUGH et al, Defts. & Appellees.	In Equity.

City, County and State of New York, ss:

WALTER S. LOGAN, being duly sworn, deposes and says:

I am the attorney and solicitor for the defendants herein, and for the appellees in the case now pending in the United States Circuit Court of Appeals on appeal from the judgment herein.

The property in controvercy in this action consists of a large amount of real estate in the cities
114 of New York and Brooklyn, largely unimproved, and in the aggregate of very great value. The complainants have filed a lis pendens covering all this property and preventing its sale or profitable rental. The property is much of it idle because of such lis pendens. Much of it is profitable only to build upon or to lease upon long leases, which cannot be done when the question of title is in controversy. My client, Mr. Charles A. Chesebrough, the owner of the property, suffers very

great damage by the protracted pendency of the suit and of the proceedings on appeal, and there is every reason why there should be a speedy determination thereof. 115

In July last this appeal was taken, within a few days of the latest day allowed by law for the taking of the appeal. In December last another appeal to the Supreme Court of the United States was taken within a few days of the last day allowed by law for the taking of an appeal to that tribunal, if such an appeal can be taken. Since December last the appellant has procured repeated orders to extend the time to file the record in this suit in the office of the Clerk of the Supreme Court of the United States, and the last extension, granted *ex parte* by Mr. Justice Wallace, expires only on the 26th of April next. 116

I am retained to appear for the respondent, Charles A. Chesebrough, in the Supreme Court of the United States, on that appeal. It is my intention, as soon as the record is filed, if it is so filed, to move at once to dismiss the appeal, on the ground that there is no appealable question which can be brought before said Supreme Court of the United States. Unless the appellant is required to file his appeal forthwith there is danger that there will be such delay that the motion cannot be made at the present term of the Supreme Court, and that a long delay will intervene before it can be done. 117

The record in this case on the appeal to the United States Circuit Court of Appeals has been printed, and the record in the Supreme Court of United States is substantially the same. I called at the office of Mr. B. Lincoln Benedict, clerk of the United States Circuit Court for the Eastern District of New York, on February 28th. He then informed me that he had not been requested to prepare the record in this case for the Supreme

118 Court of the United States and had taken no steps to that end; but that if he was so requested and was furnished with the printed case which the appellants have in their possession he could complete the record within two days at the outside, and that so far as he was concerned, there is no occasion whatever for delay.

Annexed hereto is a written statement of the said B. Lincoln Benedict, clerk of the United States Circuit Court for the Eastern District of New York, in regard to the certification of the record in this case for appeal to the Supreme Court of the United States, stating that such record could be completed within two days.

119 I believe that the appeal to the Supreme Court of the United States is taken for delay only and with no hope of success, and that the object and intention of the appellants is to keep this litigation in Court as long as possible, in the hope that they may compel parties desiring to buy, lease, or sell any of the property involved or effected by the controversy to buy them off, and that they may be able to exact tribute by virture of the pendency of such lis pendens.

WALTER S. LOGAN.

Sworn to before me this
14th day of March, 1893.

120

[L. S.] F. H. KNIGHT,
Notary Public,
New York Co.

EXHIBIT F.

121

UNITED STATES CIRCUIT COURT.
Clerk's Office,
Room 8, 3rd Floor, P. O. Building, Washington St.
P. O. Box 19.

Brooklyn, N. Y., Mar. 14, 1883.

WALTER LOGAN, Esq.

Dear Sir:

In answer to your enquiry, I have to say that if furnished by parties with a printed case as heretofore certified to the Circuit Court of Appeals, I see no reason why it cannot be certified for appeal to the Supreme Court in two days.

122

Yours Resp'y,
B. LINCOLN BENEDICT,
Clerk.

128

Supreme Court of the United

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her Husband,

Complainants and Appellees,

against

CHARLES A. CHESEBROUGH, Individually, and as Executor and Trustee under the Last Will and Testament of MARGARET CHESEBROUGH, and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of STEPHEN B. LOUNSBURY, Deceased,

Defendants and Appellants.

Appellees' Brief on Motion to Dismiss.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Counsel for Appellees,
38 William Street,
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New York.
C. B. Maguire, Printer, 210 Fulton Street,
Telephone: [illegible]

Supreme Court of the United States.

LEONORA A. ARNOLD and THOMAS E. ARNOLD, her Husband,
Complainants & Appellants,

against

CHARLES A. CHESEBROUGH, individually and as Executor and Trustee under the Last Will and Testament of MARGARET CHESEBROUGH; and ELIZABETH LOUNSBURY, as Executrix under the Last Will and Testament of STEPHEN R. LOUNSBURY, dec'd,
Defendants & Appellees.

No. 911.

This is a motion made by the appellees under the rules to dismiss this appeal.

FACTS.

In brief, the facts are these, as shown by the moving papers: The appellants brought their Bill

in Equity against the appellees in the Circuit Court of the United States for the Eastern District of New York, and after the taking of the testimony, and after the final hearing, the complainant's bill was dismissed on the merits. The Court took jurisdiction of the cause and decided it. It is clear, therefore, that the question of jurisdiction was not decided adversely to the appellants in the Court below.

The complainants appealed to the Circuit Court of Appeals for the Second Circuit on the whole case. That Court, after argument, has affirmed the decree of the Court below, and an order of affirmance directing the issue of a mandate has been filed. That Court has also denied a motion for a re-hearing, and has also denied a request on the part of the complainants that questions be certified up to this Court.

The only possible further step that can be taken by the appellants is to apply to this Court for a certiorari to bring up the record of the Circuit Court of Appeals.

Notwithstanding the proceedings had in the Circuit Court of Appeals, the complainants appealed also from the said decree of the Circuit Court for the Eastern District of New York to this Court. In other words, they took two appeals to two separate courts from the same decree. The record, as filed in this Court, does not contain any certificate by the Circuit Court for the Eastern District of New York, nor was any such certificate granted, certifying the question of jurisdiction, or any other question, to this Court. The whole record was filed in this Court.

An examination of the assignment of errors in the two courts will make it clear that the appellants are endeavoring to have another review of the whole case in the Supreme Court.

The only ground upon which the complainants sued in the Circuit Court below was because of diversity of citizenship.

We move to dismiss upon the following grounds:

1. Because the Circuit Court for the Eastern District of New York did not decide any question of jurisdiction of said Court adversely to the complainants, but, on the contrary, took jurisdiction of the cause.

2. Because, in the record in this Court, there is no certificate from said Circuit Court certifying the question of jurisdiction or any other question to this Court.

3. Because the complainants elected to take an appeal on the whole case to the Circuit Court of Appeals and that they are now bound by such action and cannot review the decree below in this Court on the question of jurisdiction or any other question.

POINT I.

Sufficient extracts from the record have been printed to enable the Court to pass intelligently upon the question.

We have printed the decree of the Circuit Court,

the decision of that Court, and also of the Circuit Court of Appeals, the assignments of errors filed on both appeals, the affidavit and certificate upon which the Court below denied the appellants further time to file their record, and have set forth in the form of an affidavit a true history of the proceedings had.

We submit that this is sufficient to enable this Court to pass upon the question whether an appeal has been taken to the Circuit Court of Appeals, whether the Court below decided the question of jurisdiction adversely to the complainants and whether there is any certificate by said Circuit Court certifying the question of jurisdiction to this Court.

We submit that under the rulings in the following cases, the Court has sufficient matter before it to decide this motion without referring to the record on file.

National Bank vs. Insurance Company, 100 U. S., 43.
Waterville vs. Van Slycke, 115 U. S., 290.
Walston vs. Nevin, 128 U. S., 578.
Texas Company vs. Scott, 137 U. S., 436.
Carey vs. The Railroad, 150 U. S., 170.

The Court will also examine the record if it needs slight additional information.

Texas Company vs. Scott, 137 U. S., 436.

POINT II.

This motion is made to dismiss, because the Supreme Court has no jurisdiction to entertain this appeal.

A motion can be made upon this ground alone.

Richmond vs. Thouron, 134 U. S., 45.

POINT III.

Inasmuch as the omplainants brought the case into Court and the Court assumed jurisdiction and decided the case on the merits, the appellants have no standing in this Court.

It is held in the case of Carey vs. The Railroad, 150 U. S., 170, as follows:

> "The Judiciary Act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the Supreme Court and the Circuit Court of Appeals therein established, designated the classes of cases in respect of which each of these Courts was to have final jurisdiction, (the judgments of the latter being subject to the supervisory power of this Court through the writ of Certiorari as provided,) and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in

this Court. The fifth section of the act specifies six classes of cases in which appeals or writs of error may be taken directly to this Court, of which we are only concerned with the first and fourth, which include those cases 'in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below, for decision'; and 'any case that involves the construction or application of the constitution of the United States.'

In order to bring this appeal within the first of these classes, the jurisdiction of the Circuit Court must have been in issue in this case, and, as appeals or writs of error lie here only from final judgments or decrees, must have been decided against appellants."

In the case also of Maynard vs. Hecht, No. 160, of the October Term, 1893, the Court also said under the act of March 3rd, 1891, Section 5, to entitle an appeal to the Supreme Court on the question of jurisdiction, "the question of the jurisdiction of the Circuit Court must have been in issue and decided *against* the party seeking to bring it before this Court for determination."

POINT IV.

Inasmuch as the record contains no certificate and no certificate was made by said Circuit Court below certifying the question of jurisdiction, or any other question, to this Court, the Court will not entertain the Appeal but will dismiss it.

This is first intimated in the case of Carey vs. The Railroad, 150 U. S., 170, but the Court did not there formally decide that question. In the later case of Maynard vs. Hecht, *Supra.*, the Court says that such a certificate *must* be in the record and it was there held that a certificate is necessary when questions of jurisdiction are to be considered and that an appeal should be dismissed for want of such certificate and that it makes *no* difference even if the question of jurisdiction appears by examination of the record to have been raised.

In the case of Moran vs. Hagermann, No. 875, October Term, 1893, the Court again states that where no question of jurisdiction is certified up to the Supreme Court for decision on appeal from a Circuit Court, the appeal will be dismissed on that ground alone.

See also

Columbus Watch Company vs. Robbins, 148 U. S., 266.

Cincinnati Railroad vs. McKeen, 149 U. S., 259.

This last case holds that questions to be certified up should not be so certified in view of the entire record but only such parts of the record as may enable the Court to decide the question.

The Court will remember that in the present appeal the whole record was filed.

POINT. V.

The complainants, having elected to appeal to the Circuit Court of Appeals from the decree on the whole case, are now barred from maintaining any appeal in this Court on the question of jurisdiction or any other question..

This rule was first laid down in the case of McLish vs. Roff. 141 U.S., 668. The Court there holds that the act of March 3, 1891, does not contemplate separate appeals in the same case and at the same time to two appellate courts. The appeal can be taken after final judgment only. The party must elect whether he will appeal to the Supreme Court on the question of jurisdiction alone or to the Circuit Court of Appeals on the whole case, and, if the latter, the Circuit Court of Appeals may, if it deems proper, certify the question of jurisdiction to the Supreme Court.

In Schunk vs. Moline Company, 147 U. S., 500, it is held, citing McLish vs. Roff, that the Supreme Court on an appeal from a Circuit Court can only consider the jurisdiction of the Circuit Court and the following is stated.

"Undoubtedly the Circuit Court had jurisdiction and if the defendant sought to have any matter of error considered, he should have taken the case to the Circuit Court of Appeals."

See also, Re Morrison, 147 U. S., 26.

In the case of Maynard vs. Hecht, No. 680, October Term, 1893, the Court has stated that the act of March 3, 1891, "did not contemplate several ap-

peals in the same suit at the same time, but gave to a party to a suit in the Circuit Court, when the question of the jurisdiction of the Court over the parties or subject-matter was raised and put in issue upon the record, at the proper time and in the proper way, the right of review by this Court, after final judgment or decree against him, of the decision upon that question only, or by the Circuit Courts of Appeals on the whole case. McLish vs. Roff, 141 U. S., 668."

See also, Northern Pacific Railroad Co. vs. Glaspell, 49 Fed. Rep., 482.
Gates vs. Bucki, 53 Fed. Rep., 961.
Crabtree vs. Madden, 54 Fed. Rep., 427.

POINT VI.

Inasmuch as the jurisdiction of the Circuit Court below was founded solely upon diversity of citizenship between complainants and appellants, the decree of the Circuit Court of Appeals affirming that judgment, is final.

The only remedy left the complainants is to apply for a certificate to the Circuit Court of Appeals (which has been denied), or to apply to the Supreme Court for a certiorari.

Act of March 3, 1891, 26 Stats., 826, 828, Sec. 6, Chap. 517.
Colorado Central Consolidated Mining Company vs. Turck, 150 U. S. 138.

In this last case this Court held that when the jurisdiction of a Circuit Court is invoked solely on the grounnd of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case.

POINT VII.

The appeal should be dismissed with costs.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of counsel for appellees.